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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a proceeding pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), to review an increased rate filed by a natural gas company, the company's statutory burden of demonstrating "that the increased rate * * * is just and reasonable" applies only to the "changed" portions of the new rate, with the Commission bearing the burden of showing that the "unchanged" portions are unlawful.

2. Whether the Commission's prior approval of negotiated settlements with the stipulation that its approval was not to be binding in future proceedings constituted a "settled practice" having the force and effect of precedent.*

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*In addition to the parties named in the caption, the following were parties to the proceeding in the court of appeals: Atlanta Gas Light Company, Brooklyn Union Gas Company, Columbia Gas Transmission Corporation, Commonwealth Gas Pipeline Corporation, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, Long Island Lighting Company, National Fuel Gas Supply Corporation, North Carolina Natural Gas Corporation, Philadelphia Electric Company, Philadelphia Gas Works, Piedmont Natural Gas Company, Inc., Public Service Company of North Carolina, Inc., Public Service Electric and Gas Company, South Jersey Gas Company, Transcontinental Gas Pipe Line Corporation and Washington Gas Light Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Energy Regulatory Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–27a), as amended (App. C, *infra*, 32a–33a), is not yet reported. The opinion and orders of the Commission (Apps. F and G, *infra*, 36a–52a, 53a–54a) and the opinion of the administrative law judge (App. H, *infra*, 55a–62a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 28a–31a) was entered on September 24, 1980. Petitions for rehearing were denied on December 18, 1980 (Apps. C, D, and E, *infra*, 32a–33a, 34a, 35a). On March 13, 1981, the

Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 17, 1981. On April 16, 1981, the Chief Justice further extended the time for filing a petition for certiorari to and including May 17, 1981 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

Sections 4 and 5(a) of the Natural Gas Act, 15 U.S.C. 717c and 717d(a), are set forth in Appendix I, *infra*, 63a–65a.

STATEMENT

A. *The Statutory Framework*

Under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, the Federal Energy Regulatory Commission has jurisdiction over wholesale sales of natural gas in interstate commerce. Section 4 of the Act declares that rates for all such sales shall be "just and reasonable," and prohibits natural gas companies from either granting undue preferences to any customer or subjecting any customer to undue prejudice and from maintaining unreasonable differences in rates as between localities. 15 U.S.C. 717c(a), (b).

Before a natural gas company may increase its rates, it must file with the Commission a new schedule setting forth the changes to be made in its existing rates. 15 U.S.C. 717c(d). Section 4(e) of the Act provides that, upon such a filing, the Commission may order a hearing on the lawfulness of the new rates and may suspend them for up to five months, after which the increased rates may be collected, subject to refund (with interest) of any portion of the increased rates that the Commission finds is not justified. 15 U.S.C. 717c(e). Section 4(e) further provides that "[a]t any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

Section 5(a) of the Act, 15 U.S.C. 717d(a), empowers the Commission to examine existing rates and to establish new ones where it finds, after a hearing, that any rate is "unjust, unreasonable, unduly discriminatory, or preferential * * *." Section 5(a) rate adjustments are prospective only, with no power in the Commission to order refunds.

B. *Factual Background*

1. Transcontinental Gas Pipe Line Corporation (Transco) operates one of the nation's largest long-line natural gas transmission systems. The pipeline transports gas from the Texas and Louisiana gas fields through the Southern and mid-Atlantic states to its terminus in the New York metropolitan area. Transco sells gas to more than 100 local gas companies who, in turn, sell to millions of retail customers.

Transco's service territory is divided into three sales rate zones: zone 1 includes Mississippi, Alabama and Georgia; zone 2 includes North and South Carolina, Virginia and the District of Columbia; zone 3 includes Maryland, Delaware, Pennsylvania, New Jersey and New York. For rate purposes, the costs of transmitting gas are allocated to Transco's customers according to their location in one of the three sales zones. Users located at greater distances from the gas fields pay more than the nearer customers.

The total amount of the pipeline's transmission costs are not in dispute in this case. Rather, the case involves questions about which group of customers should bear what share of the costs. "Zone rate differentials" are the relationships between the rates that each zone's customers must pay. As part of a settlement of a Section 4 rate proceeding in 1962, Transco and its customers agreed upon a numerical formula fixing the pipeline's zone rate differentials, and these differentials remained in effect through agreements reached in subsequent rate proceedings. Pursuant to these agreements, customers in zone 2 were required to pay 2.8 cents more per thousand cubic feet (Mcf) of gas than zone 1 customers, and zone 3 customers were

required to pay 3.6 cents more per Mcf of gas than zone 2 customers.[1]

2. In 1976, Transco filed an $81 million rate increase with the Commission pursuant to Section 4(d) of the Act. Although Transco proposed no change in the 1962 (or "historical") differentials, the customers in zones 1 and 2 took the position that transmission costs should be allocated by an "Mcf-mile" method, which reflects the volumes of gas delivered to each zone times the distance that the gas must travel to reach that zone, rather than by the previously agreed-upon formula. The zone 3 customers (those situated furthest from the pipeline's sources of supply) supported continued use of the 1962 differentials.

An administrative law judge concluded that, because the 1962 differentials were a necessary part of Transco's filing for increased rates, even though the company had not proposed any change in them, Section 4(e) of the Act placed the burden on Transco to justify their continued use (App. H, *infra*, 60a). The judge determined, however, that Transco had met its burden of demonstrating the reasonableness of the historical differentials (*id.* at 61a–62a).

On exceptions, the Commission concluded that Transco had failed to carry that burden; that use of the 1962 differ-

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[1] In approving the 1962 settlement embodying these differentials, the Commission stated that its approval

> is not to be construed as a concurrence with the cost of service determinations, allocation methods and rate design principles used in arriving at rates and charges for future sales * * * and neither the Commission, its Staff, or other parties to the proceeding are to be prejudiced or bound thereby in future proceedings.

Transcontinental Gas Pipe Line Corp., 27 F.P.C. 187, 190 (1962). The Commission's orders approving subsequent settlements containing these differentials included similar language. See *Transcontinental Pipe Line Corp.*, 31 F.P.C. 1150, 1151 (1964); *Transcontinental Pipe Line Corp.*, 36 F.P.C. 431, 434 (1966); *Transcontinental Pipe Line Corp.*, 46 F.P.C. 1411, 1413 (1971); *Transcontinental Pipe Line Corp.*, 51 F.P.C. 1243, 1247 (1974); *Transcontinental Pipe Line Corp.*, 54 F.P.C. 2150, 2151 (1975); *Transcontinental Pipe Line Corp.*, Docket No. RP75–75 (Jan. 30, 1976).

entials was no longer justified; and that transportation costs should henceforth be allocated by the Mcf-mile method in order to reflect more accurately the distance the gas must travel to reach customers in different communities located hundreds of miles apart along the pipeline (App. F, *infra*, 36a–52a). The Commission explained that the distance of haul is the primary cost factor in transporting gas and stated that the Mcf-mile approach was the method "most often * * * employed by the Commission for the purpose of allocating transmission costs on major long-line natural gas transmission systems such as Transco's" (App. F, *infra*. 39a). After reviewing the record in the rate proceeding, the Commission concluded that "rates resulting from the allocation of Transco's transmission costs to zones using the Mcf-mile method are just and reasonable and represent a proper apportionment of transmission cost responsibility between and among Transco's customers" (*ibid.*).

As to the historical differentials, the Commission observed that "no adequate or proper basis has been shown to justify the continued application of previously negotiated settlement rate differentials * * *" (*ibid.*). More specifically, the Commission found that there was "no persuasive evidence on this record that the historical differentials are based upon or adequately reflect cost considerations * * *" (*id.* at 41a). The Commission noted that its "prior approval of the historic zone rate differentials in the original and succeeding settlements cannot be accorded precedential weight" (*ibid.*). The change from the 1962 differentials to the Mcf-mile method shifted approximately $15 million a year in costs from zones 1 and 2 customers to customers in zone 3 (*id.* at 42a, 51a).

3. The court of appeals reversed the Commission's allocation decision (App. A, *infra*, 10a–21a).[2] The court held that the Commission bore the burden, under Section 5(a) of the Act, of showing that the historical rate differentials were unjust and unreasonable before it could order a

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[2]The court upheld the Commission's separate determination concerning Transco's rate of return (App. A, *infra*, 21a–26a).

change in Transco's cost allocation formula, and that the Commission failed to meet that burden in this case (App. A, *infra*, 10a–17a, 20a–21a). The court rejected the Commission's contention that, because Transco had filed for increased rates, under Section 4(e) of the Act the burden was on the pipeline to establish the reasonableness of every component of its rate filing, including those portions of the new rates that were based on the historical differentials. Instead, the court asserted that the historical differentials "were no part of Transco's argument for higher rates" (App. A, *infra*, 15a) and concluded that a natural gas company that has filed increased rates does not "bear[ ] the burden of proof on those portions of its filing that represent no departure from the status quo" (*ibid.*).

Thus, in the court's view (App. C, *infra*, 32a–33a), the Commission may not proceed under Section 4(e) to order modifications in a ratemaking component unless the Commission's proposed modifications "represent at least partial approval of the change for which the enterprise had petitioned in its filing"; if the Commission wishes to adjust any unchanged element of a new rate filing, it must comply with the requirements of Section 5(a). Under Section 5(a) the Commission had the burden of "invalidating the existing method" by adducing "substantial evidence tending to show that the existing zone rates are unjust and unreasonable" (App. A, *infra*, 16a). The court ruled that the Commission disregarded the procedural requirements of Section 5(a) by placing the burden on the opponents of the change in cost allocation differentials "rather than upon itself" (App. A, *infra*, 20a), and by "failing to make the findings that the existing zone rates legally in effect were unlawful" (*ibid.*).

The court added that even if only Section 4 were applicable, the Commission "'bears the burden of explaining the reasonableness of any departure from a long standing practice, and any facts underlying its explanation must be supported by substantial evidence'" (App. A, *infra*, 17a, quoting from *Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578, 586 n.31 (D.C. Cir. 1979)). The court determined that the Commission had to meet this burden despite the Commission's argument that the 1962 differen-

tials "were merely numbers that did not reflect a recog-

nized methodology" and that its approval of settlements incorporating the differentials did not constitute a "settled practice" (App. A, *infra*, 17a). Upon review of the administrative record, the court held that the Commission failed to provide substantial evidence in support of its change in the method of allocating the pipeline's transmission costs (*id.* at 17a–20a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question of statutory construction under the Natural Gas Act. The court of appeals' ruling that the burden of proof provision of Section 4(e) of the Act—which requires a natural gas company filing increased rates to justify the new rates as just and reasonable—applies only to the "changed" but not to the "unchanged" elements of the company's rate filing is contrary to both the plain language and the legislative history of the statute and is at odds with the policies underlying the statutory scheme. Moreover, the interpretation adopted by the court below is inconsistent with the traditional understanding of the statute as expressed in this Court's cases and the Commission's decisions. Unless overturned, the court of appeals' decision will seriously frustrate the Commission's administration of the Natural Gas Act and of the substantially similar provisions of the Federal Power Act governing electric utility rates (16 U.S.C. 824d(e)) by impairing the Commission's authority to order refunds and thereby protect gas and electric consumers against excessive or discriminatory rate increases.

a. This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also, *e.g.*, *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). Here, the language of Section 4(e) clearly indicates that Congress intended a company filing increased rates to bear the burden of justifying every aspect of its new rates. The

statutory language is broad and unrestricted: the company has "the burden of proof to show that the increased rate * * * is just and reasonable." This provision draws no distinction between "changed" and "unchanged" elements of a filing for increased rates and there is nothing in the remaining provisions of Section 4(e) suggesting that that section applies only to those portions of the newly filed rates that reflect a "change" from the company's prior rate filings.

The court of appeals' emphasis upon a "changed-unchanged" dichotomy (App. A, *infra*, 15a) reflects a considerable degree of confusion concerning the nature of the ratemaking process. An "increased rate" involves more than merely a new number at the end of that process; it necessarily embraces a host of underlying assumptions and methodologies that are inextricably linked to the higher price. Even if a gas or electric company filing an increased rate does not propose to change a specific aspect of its existing rate structure, the interrelationship of every element of the new rate requires that the rate be viewed as a whole rather than in a piecemeal fashion. Thus, if the burden of justifying "the increased rate" is to be meaningful, it must apply equally to all elements of the new rate, not only to those elements that represent a "departure from the status quo" (App. A, *infra*, 15a).

The error in the court of appeals' approach is illustrated by its statement that "[t]he [historical] zone allocations in dispute here were no part of Transco's argument for higher rates" (App. A, *infra*, 15a). While it is true that Transco's rate filing did not incorporate a new method for allocating transmission costs among its customers, Transco did increase both its overall transmission costs and the amount of those costs allocated to customers in each of its three rate zones. Thus the method used by Transco to allocate transmission costs was an essential element in its computation of increased rates for each zone.

Moreover, contrary to the decision below, nothing in Section 5(a) of the Act restricts the Commission's authority, in a Section 4 proceeding, "to impose its own rates or methods

for their calculation" (App. A, *infra*, 11a) upon a natural gas company that has failed to establish the reasonableness of any element of its increased rate. Indeed, Section 4(e) provides that "the Commission may make such orders with reference [to a new rate] as would be proper in a proceeding initiated after it had become effective [*i.e.*, a Section 5(a) proceeding]." In interpreting an analogous provision in the Interstate Commerce Act, this Court explained that

> [t]he power of the [Interstate Commerce] Commission to deal with the situation as if the proposed new rates had become effective is necessarily a comprehensive one. * * * The Commission is not bound either to approve or disapprove *in toto* the new rates that are proposed. It can modify the proposal in any respect and require that the proposed rates as modified or wholly different rates be substituted for the present ones. That has been the view of the Commission since the beginning; and we think it is the correct one.

Ayrshire Collieries Corp. v. *United States*, 335 U.S. 573, 582, 583 (1949) (footnote omitted). The court of appeals therefore erred in concluding that Section 5(a) provides the exclusive basis for the Commission to order a modification in an "unchanged" portion of a filing for increased rates.

b. The legislative history of the Act does not support the "changed-unchanged" dichotomy adopted by the court below. The House Report states with respect to Section 4(e) that "[t]he burden of proof is placed upon the natural-gas company to justify any increase in rates * * *." H.R. Rep. No. 709, 75th Cong., 1st Sess. 5 (1937). Here, of course, Transco increased its rates to customers in each zone based in part on the use of the 1962 cost allocation differentials. Consistent with the committee report, the pipeline has the burden under the statute of demonstrating that the increased rates are fair and nondiscriminatory.

Furthermore, in its appraisal of the legislative history, the court of appeals ignored the fact that the burden of proof language of Section 4(e) "was taken bodily from the Interstate Commerce Act." *Hope Natural Gas Co.* v. *FPC*, 196 F.2d 803, 806–807 (4th Cir. 1952). Cf. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584 (1942). The

Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539 *et seq.*, amended the Interstate Commerce Act to provide that "the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier." 36 Stat. 552.[3] In construing this provision shortly after its enactment, the Interstate Commerce Commission drew no distinction between the "changed" and "unchanged" portions of an increased rate, but simply concluded that "the carrier is called upon to prove that the new rate *as a whole* is reasonable." *Advances in Rates— Western Case*, 20 I.C.C. 307, 312 (1911) (emphasis added).[4] See IIIB I. Sharfman, *The Interstate Commerce Commission* 469 (1936). Because the burden of proof provision of Section 4(e) of the Natural Gas Act tracks the language of the similar provision in the Interstate Commerce Act, it is proper to conclude that Congress intended the construction of Section 4(e) to follow that accorded to the provision on which it was based. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *ICC* v. *Parker*, 326 U.S. 60, 65 (1945).

c. The decision below does not accord with "sound regulatory policy" (App. A, *infra*, 15a). Under the court of appeals' theory, only those portions of the increased rate that stem from "changes" proposed by the company would be reviewable under Section 4(e). The remaining portions of the increased rate that represent "no change" from the existing rate components and methods could only be modified prospectively under Section 5(a). The opinion thus requires that every increased rate be broken into "changed" and "unchanged" elements. The burden of proof

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[3]Senator Cummins, the proponent of this provision, explained (45 Cong. Rec. 7136 (1910)):

> [I]n these hearings the railway companies shall have the burden of proof. All the information, or practically all of it, is in their hands. It is but equitable to compel them to lay before the commission the conditions and circumstances which they believe warrant an increase in the rates.

[4]The *Western Case* opinion was cited approvingly by the Court in *Ayrshire Collieries Corp.* v. *United States*, *supra*, 335 U.S. at 583 n.9.

and the availability of suspensions and refunds would differ according to which element bore which label. If a component of the increased rate reflected a "change" from the company's prior rate filings the company would have the burden of justifying that component, and the customers would have the protection of refunds in the event the company failed to meet its burden. If an element reflected "no change" from prior practice, that element would be processed under Section 5(a), and the burden would be on the Commission, with no refunds available.

The efficiency of the administrative process will not be promoted by requiring the Commission to conduct a bifurcated proceeding to review the "changed" and "unchanged" components of a single rate filing. As a practical matter, it makes far better sense to require that the company, which has at its disposal virtually all of the pertinent information supporting the new rate, justify the increased rate in its entirety (see note 3, *supra*).[5] In addition, restricting the coverage of Section 4(e) (and the availability of refunds for excessive rates) to only the "changed" features of an increased rate would frustrate the broad consumer protection policies of the Natural Gas Act. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389–390 (1959). Under the decision below, a company could limit the Commission's authority to order refunds under Section 4(e) by filing an increased rate that "changes" only one component of its cost while leaving the remaining elements "unchanged." Even if the "unchanged" cost elements had declined or disappeared, the Commission could not invalidate them unless it carried its burden under Section 5(a) and, even after finding the "unchanged" elements to be unjust and unreasonable, the Commission would be powerless to order refunds.

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[5] In its *Western Case* opinion, the Interstate Commerce Commission observed that "[t]he duty having been laid upon the carriers to fix reasonable rates, it was neither harsh nor oppressive to require them to make justification when such rates were to be increased." 20 I.C.C. at 314.

d. The "changed-unchanged" dichotomy is also inconsistent with this Court's conclusion in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962), that the "natural gas company initiating an increase in rates under § 4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being 'just and reasonable.' " In that case, a pipeline filed a new rate schedule with the Commission containing increased rates for its six sales rate zones. The Commission decided to treat the rate of return issue separately from the zone allocation issue. Accordingly, without determining whether the new rates properly allocated costs among the pipeline's zones of operation, the Commission disallowed the company's proposed rate of return and ordered refunds.

The pipeline argued that this procedure could result in its undercollection of revenues, because if the Commission later ordered adjustments in the allocation of costs, the overcharged customers would be entitled to refunds which the company could not recoup from its undercharged customers. The Court rejected this argument, concluding that "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate." 371 U.S. at 153. In addition, the Court ruled that if the Commission were later to invalidate "the old and undecided zone rate structure under attack as discriminatory" (*ibid.*), the Commission had the power—presumably under Section 4(e)—to order decreased rates and refunds to those customers who were the victims of the discrimination. *Id.* at 154. The court of appeals' ruling that the Commission "lacks the authority to substitute one rate for another without adhering to the requirements of [S]ection 5(a)" (App. A, *infra*, 16a–17a) cannot be reconciled with this aspect of the decision in *Tennessee Gas*.

The court of appeals' reliance (App. A, *infra*, 12a–13a) upon language in this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 340–341 (1956), is misplaced. The Court in *Mobile* merely

held that the Natural Gas Act does not authorize a natural gas company to make a unilateral change in a rate specified by contract simply by filing a new schedule of rates with the Commission. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 109–111 (1958). Furthermore, contrary to the decision below, the decision in *Mobile* makes clear that the Commission's Section 4(e) authority over increased, or "newly changed," rates is as broad as the authority it exercises under Section 5(a) over "long-established" rates. In both instances, "[t]he scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful." 350 U.S. at 341; see *id.* at 343. As to the "newly changed rate," Section 4(e) gives the Commission the additional powers of rate suspension and ordering retroactive refund of any excess. 350 U.S. at 341, 343. The court of appeals' holding—that the suspension and refund powers are available with respect to only certain (*i.e.*, "changed") portions of an increased rate—is thus not compelled by anything in the Court's decision in *Mobile*.[6]

e. For nearly 30 years, the Commission has, with fair consistency, viewed Section 4(e) as requiring a company that has filed an increased rate to justify each and every element of its filing.[7] In accordance with this view, the Com-

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[6]The curtailment cases cited by the court of appeals (App. A, *infra*, 13a, 14a) also do not support its decision. Those cases simply held that the Commission could not dictate in advance the terms of curtailment plans filed by natural gas companies under Section 4. If the Commission were found to have directed a company in the first instance to file a particular plan, the courts treated the Commission's action as arising under its Section 5(a) power to review existing rates, rather than under the Section 4(e) power to review newly filed rates.

[7]*E.g.*, *Transcontinental Gas Pipe Line Corp.*, 11 F.P.C. 94, 97 (1952); *William Negley*, 17 F.P.C. 550, 556 (1957); *H.L. Hunt*, 28 F.P.C. 897, 900 (1962); *Northern Natural Gas Co.*, 52 F.P.C. 128, 129–130 (1974); *New England Power Co.*, Docket Nos. E–8641, *et al.*, "Order Denying Rehearing * * *" (Apr. 3, 1978), slip op. 4–5; *National Fuel Gas Supply Corp.*, Docket Nos. TA80–1–16 (PGA80–2 & IP80–2), "Order Denying Rehearing and Reconsideration" (Apr. 4, 1980), slip op. 3, petition for review dismissed, No. 80–1586 (D.C. Cir. Dec. 31, 1980).

mission has frequently ordered changes in elements of an increased rate under Section 4(e) without regard to whether the requirements of Section 5(a) had been satisfied.[8]

This Court has repeatedly stated that considerable respect is due " 'the interpretation given [a] statute by the officers or agency charged with its administration.' " *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). See also, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). In this case, the court of appeals should have deferred to the Commission's reasonable interpretation of the statute that it has been appointed to apply and enforce.

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[8] *See, e.g., Southern Natural Gas Co.*, 29 F.P.C. 323, 347–348 (1963); *El Paso Natural Gas Co.*, 22 F.P.C. 260, 275–277 (1959), and 22 F.P.C. 659 ( ), remanded *sub nom. El Paso Natural Gas Co.* v. *FPC*, 281 F.2d 567 (5th Cir. 1960), cert. denied, 366 U.S. 912 (1961); *United Fuel Gas Co.*, 31 F.P.C. 1342, 1353–1355 (1964), and 32 F.P.C. 1106 (1964); *United Gas Pipe Line Co.*, 32 F.P.C. 687, 693 (1964), vacated *sub nom. United Gas Pipe Line Co.* v. *FPC*, 357 F.2d 230 (5th Cir. 1966), aff'd, 386 U.S. 237 (1967); *United Gas Pipe Line Co.*, 50 F.P.C. 1348, 1352–1353 (1973), and 51 F.P.C. 1014, 1018 (1974), aff'd *sub nom. Consolidated Gas Supply Corp.*, 520 F.2d 1176 (D.C. Cir. 1975); *Kansas-Nebraska Natural Gas Co.*, 53 F.P.C. 1691, 1725–1728 (1975), and 54 F.P.C. 923 (1975), aff'd *sub nom. Kansas-Nebraska Natural Gas Co.* v. *FPC*, 534 F.2d 227 (10th Cir. 1976); *Texas Gas Transmission Corp.*, Opinion No. 792 (Apr. 11, 1977), and Opinion No. 792-A (June 7, 1977), remanded *sub nom. Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578 (D.C. Cir. 1979); *Consolidated Gas Supply Corp.*, Opinion No. 819 (Aug. 12, 1977); and *Texas Eastern Transmission Corp.*, Opinion No. 21 (Feb. 16, 1979) and Opinion No. 21-A (Aug. 9, 1978), remanded *sub nom. Texas Gas Transmission Corp.* v. *FERC*, No. 79-1385. (D.C. Cir. Feb. 13, 1981). The latter case was remanded based on the court's opinion in the instant case.

As the court of appeals observed (App. A, *infra*, 14a), the Commission, in *Northern Natural Gas Co.*, 14 F.P.C. 11 (1955), aff'd *sub nom. Interstate Power Co.* v. *FPC*, 236 F.2d 372 (8th Cir. 1956), cert. denied, 352 U.S. 967 (1957), cited Section 5(a) as authority for its modification of a pipeline's cost allocation methodology, characterizing the proceeding as a "discrimination case" (14 F.P.C. at 19) even though the proceeding arose from a filing for increased rates under Section 4. But the overwhelming weight of Commission precedent points in the other direction.

f. The practical implications of the court of appeals' opinion are readily apparent. Gas and electric companies filing major rate increases with the Commission have already relied on the decision below in 16 cases, seeking in each instance to narrow and confine inquiries by consumers and the Commission's staff concerning the increased rate.[9] In some of these cases, the parties are engaged in time-consuming and contentious debates, in an effort to sort out the "changed" from the "unchanged" elements of the increased rate.

In addition, the court of appeals has already remanded one case to the Commission on the strength of its opinion below.[10] In view of the fact that the Commission's orders are frequently challenged in the District of Columbia Circuit (122 of the 275 cases brought last year), the opinion below takes on even broader significance. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 537 n.14 (1978).

2. The court of appeals also held (App. A, *infra*, 17a–18a) that the Commission was required to accord precedential weight to the Commission's prior approval of negotiated

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[9] *E.g.*, *Central Illinois Public Service Co.*, Docket No. ER80–71; *Public Service Co. of New Mexico*, Docket No. ER78–338 (Phase II); *Natural Gas Pipeline Co. of America*, Docket No. RP77–98, *et al.*; *North Penn Gas Co.*, Docket No. RP79–68; *Cities Service Gas Co.*, Docket No. RP79–76; *Alabama-Tennessee Natural Gas Co.*, Docket No. RP80–2; *Texas Gas Transmission Corp., Docket No. RP75–19 (on remand); Texas Eastern Transmission Corp.*, Docket No. RP74–41 (on remand); *Cities Service Gas Co.*, Docket No. RP74–4 (on remand); *Great Lakes Gas Transmission Co.*, Docket Nos. RP79–10, RP80–134; *Arkansas Louisiana Gas Co.*, Docket Nos. RP80–91, RP80–93; *Algonquin Gas Transmission Co.*, Docket No. RP80–72; *Sea Robin Pipe Line Co.*, Docket Nos. RP80–55, RP80–118; *DOMAC* (Distrigas), Docket Nos. RP79–23, RP79–24; *Consolidated Gas Supply Corp.*, Docket No. RP80–61.

[10] *Texas Gas Transmission Corp.* v. *FERC*, No. 79–1385 (D.C. Cir. Feb. 13, 1981). The opinion has also been relied on by parties in other proceedings: *Mississippi Valley Gas Co.* v. *FERC*, No. 79–1598 (5th Cir.) (pending decision); *New Orleans Public Service Co.* v. *FERC*, No. 79–3788 (5th Cir.) (pending decision).

settlements incorporating the historical differentials, despite the express disclaimer that any such approval was not to be construed as binding in future proceedings. This holding also warrants review. The decision injects an element of uncertainty into the negotiating process in cases before the Commission (and perhaps in cases before other agencies as well). Moreover, the likely impact of the decision will be to discourage settlements and thereby increase the administrative burdens faced by the Commission in enforcing the provisions of the Natural Gas Act and the Federal Power Act.

The court below concluded that even if Section 4(e) were applicable to the Commission's review of "unchanged" portions of Transco's filing for increased rates, the Commission's order invalidating the historical differentials could not stand "because it did not provide a reasoned explanation for the departure from settled practice" (App. A, *infra*, 10a). But here, the "settled practice" was merely a numerical relationship in which the parties had previously concurred as part of a multifaceted settlement agreement. By treating that agreed-upon relationship as having the force and effect of precedent, the opinion below stands in conflict with the accepted view that the Commission can approve proposed settlements "in the general interest of the public" without making an independent finding on substantial record evidence that the settlement will result in just and reasonable rates. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 314 (1974). See *Pennsylvania Gas and Water Co.* v. *FPC*, 463 F.2d 1242, 1249–1251 (D.C. Cir. 1972).

In addition, the court of appeals' decision directly undercuts the Commission's considered policy of treating settlements as nonprecedential. The Commission has consistently cautioned that settlements may not be considered as binding precedent.[11] Furthermore, the Commission's regula-

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[11] See, *e.g.*, *American Louisiana Pipe Line Co.*, 21 F.P.C. 409, 413 (1959); *The Manufacturers Light & Heat Co.*, 23 F.P.C. 446, 447 (1960) ("It should be clearly understood that acceptance of settlement agreements for past rates does not establish principles for future rate forms"); *Placid Oil Co.*, 30 F.P.C. 682, 683 (1963) ("[A] settlement

tions require that proposed Commission orders accepting settlements specify that "[t]he Commission's approval of this settlement shall not constitute approval of or precedent regarding any principle or issue in this proceeding." 18 C.F.R. 1.18(e)(1)(iii)(A). Thus, the settlement given weight by the court below stated that

> [T]he Commission's action is not to be construed as a concurrence with the cost of service determinations, allocation methods and rate design principles used in arriving at rates and charges for future sales * * * and neither the Commission, its Staff, or other parties to the proceeding are to be prejudiced or bound thereby in future proceedings.

Transcontinental Gas Pipe Line Corp., 27 F.P.C. 187, 190 (1962). Similar limiting language appeared in each Commission order approving subsequent rate settlements on Transco's system. That limiting language, typical language in Commission orders approving settlements, was ignored by the court below.

Settling disputes is critical to the Commission's ability to fulfill its administrative responsibilities.[12] In a representative year, a total of 70 gas pipeline rate cases are set for hearing. Of that total an estimated 60% are disposed of by complete settlement of all issues, and another 20% result in

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* * * is an accommodation of conflicting arguments and positions which is agreed to as a reasonable basis for terminating a proceeding in a manner consistent with the public interest").

[12] The importance of settlement as a fundamental tool of the administrative process is reflected in the basic requirement of the Administrative Procedure Act, 5 U.S.C. 554(c), that agencies provide an opportunity for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment * * *." *The Attorney General's Manual on the Administrative Procedure Act* (1947) explains that this requirement stemmed from the Attorney General's Committee Report, which viewed "informal procedures" as constituting "the vast bulk of administrative adjudication" and as "truly the lifeblood of the administrative process." *Id.* at 48. The purpose of the requirement is to provide "*so far as practicable*, for the informal settlement or adjustment of controversies in lieu of formal adjudicatory proceedings." *Ibid.* (emphasis added).

partial settlements. Similarly, this decision has an impact upon settlements in electric rate cases. On an annual basis, 80 electric rate cases will be set for hearing, of which 67% will be resolved completely by settlement.

In our view, the opinion below will likely deter settlement. Parties may choose not to settle if subsidiary methods or factors adopted solely for the purpose of settlement are now to be accorded precedential significance. Moreover, the Commission will be reluctant to approve settlements if doing so will perpetutate the terms for years to come. Rates or methodologies adopted only for settlement purposes would become the status quo—apparently presumed just and reasonable in subsequent rate proceedings unless the company proposed to change them. Thus, the decision below could have the effect of encouraging full-scale adjudication of all rate issues—to the detriment of consumers, the regulated companies, and the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Federal Energy Regulatory Commission

MAY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2182

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

COMMONWEALTH GAS PIPELINE CORP., CAROLINA PIPELINE CORPORATION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

No. 79-2183

NORTH CAROLINA NATURAL GAS CORPORATION PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. PIEDMONT NATURAL GAS COMPANY, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CAROLINA PIPELINE COMPANY, COMMONWEALTH GAS PIPELINE CORPORATION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, TRANSCONTINENTAL GAS PIPE LINE CORP., BROOKLYN UNION GAS CO., ET AL., COLUMBIA GAS TRANSMISSION CORP., WASHINGTON GAS LIGHT COMPANY, ATLANTA GAS LIGHT COMPANY, INTERVENORS

No. 79-2184

NORTH CAROLINA UTILITIES COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CAROLINA PIPELINE COMPANY,
COMMONWEALTH GAS PIPELINE CORPORATION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
TRANSCONTINENTAL GAS PIPE LINE CORP.,
BROOKLYN UNION GAS CO., ET AL.,
COLUMBIA GAS TRANSMISSION CORP.,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
INTERVENORS

No. 79-2195

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE CORP.,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
NORTH CAROLINA UTILITIES COMMISSION,
CAROLINA PIPELINE COMPANY,
COMMONWEALTH GAS PIPELINE CORPORATION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
BROOKLYN UNION GAS COMPANY, ET AL.,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY, INTERVENORS

No. 79-2213

THE BROOKLYN UNION GAS COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE CORP.,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
COMMONWEALTH GAS PIPELINE CORPORATION,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
NORTH CAROLINA UTILITIES COMMISSION,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY, INTERVENORS

No. 79-2322

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CAROLINA PIPELINE COMPANY,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
BROOKLYN UNION GAS COMPANY, ET AL., INTERVENORS

**Petition for Review of an Order of the
Federal Energy Regulatory Commission**

Argued April 10, 1980

Decided September 24, 1980

Before MCGOWAN, WILKEY and WALD, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge:* These direct review proceedings under the Natural Gas Act involve two separate orders entered by the Federal Energy Regulatory Commission (FERC)—the successor agency to the Federal Power Commission (FPC), 42 U.S.C. § 7172(a)(1)(C). One of those orders, reflecting the Commission's consideration of rate increases filed in 1976 by Transcontinental Gas Pipe Line Corporation (Transco) with the FPC under section 4 of the Act, is challenged in respect of the 14% rate of return on equity allowed by it. The other order, entered by the Commission after a hearing initiated by it under section 5(a) of the Act, is attacked, on both procedural and substantive grounds, for its imposition of a new basis for allocating Transco's costs attributable to distance. For the reasons appearing hereinafter, we affirm with respect to the rate of return of issue, but set aside the second order relating to cost allocation.[1]

I

Transco operates a major long-line natural gas pipeline system running from its sources of supply in Texas and Louisiana through the southern and mid-Atlantic states to its terminus in the New York metropolitan area. Its service territory is divided into three sales rate zones: Mississippi, Alabama, and Georgia are in zone 1, the Carolinas, Virginia, and the District of Columbia in zone 2, and

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[1] Six separate petitions for review were filed, and have been consolidated by the court for hearing and disposition. In No. 79-2322, Transco has appealed the rate of return determination of the Commission as too low, whereas North Carolina Utilities Commission (NCUC) in its petition in No. 79-2184 asserts that it is too high. In No. 79-2182, the New York Public Service Commission (NYPSC) challenged FERC's cost allocation determination; and several North Carolina utilities in No. 79-2183, NCUC in No. 79-2184, Long Island Lighting Company (LILCO) in No. 79-2195, and a group of eight utilities in Pennsyvania, New Jersey and New York in No. 79-2213, have also petitioned for review of that decision.

Maryland, Delaware, Pennsylvania, New Jersey, and New York in zone 3.

A 1962 settlement between Transco and its customers provided that customers in zone 2 would pay 2.8 cents per thousand cubic feet (Mcf) more than zone 1 customers, and that zone 3 customers would pay 3.6 cents per Mcf more than zone 2 customers. The 1962 settlement and subsequent rate settlements incorporating these cost allocations were approved by the FPC, and the rate differentials have been embodied in Transco's legally effective rate schedules.

On July 30, 1976, Transco filed with the FPC an application for $81.3 million in higher rates (Docket RP76-136). On December 30, 1976, Transco, in Docket RP77-26, proposed an increase in interruptible service rates. No change in the zone rate differentials was proposed by Transco in either of these filings. The FPC consolidated the two petitions. The parties were able to reach a partial settlement on issues not contested here that was approved by the Commission on June 27, 1978.[2] During the interim, Transco has applied for new rates to take effect on January 1, 1978. This mean that Transco's 1976 request for a higher rate of return was limited, or locked in, to the eleven months between February 1 and December 31, 1977.[3]

After a hearing, a FERC administrative law judge issued an initial opinion establishing 14% as a reasonable rate of return on Transco's equity for the locked-in period.[4] The opinion also stated that the zone of reasonableness for this rate lay between 13.5 and 14.3%.[5] This initial opinion was

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[2] *Order Granting in Part Motion for Reconsideration, Accepting Settlement Agreement in Part, and Remanding for Procedures on Contested Zoning Issue*, Docket Nos. RP76-136 and RP77-26 (June 27, 1978), *reprinted in* Record at 4133-35.

[3] The cost allocation issue, however, is unaffected by the later filing.

[4] *Initial Decision on Reserved Issues*, Docket Nos. RP76-136 and RP77-26 (Feb. 13, 1978), *reprinted in* Record at 3937-49 [hereinafter referred to as *Initial Decision*].

[5] *Id.* at 9-10.

adopted by the Commission on August 30, 1979.[6] The ALJ relied heavily upon testimony of the Commission's expert witness, who compared Transco's risks and rate of return to those of similar investments such as other pipelines and electric utilities. Record at 160–68. Transco's witness also compared Transco to such investments, but suggested that the Commission's witness had underestimated the risks facing Transco and concluded that from 16½% to 17% would be a more reasonable rate of return. Record at 29–42, 45–51, 473.

Although Transco had not proposed any change in the 1962 zone allocations, the parties found themselves unable to agree on a method of cost allocation during settlement negotiations. Accordingly, the Commission, confronted with a claim that no change in the existing zone differentials could be made in the absence of a finding under section 5(a) of the Act that they were unlawful, ordered a hearing on this question, and, on December 19, 1978, an administrative law judge handed down an initial decision endorsing the 1962 zone differentials.[7] However, in Opinion No. 59,[8]

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[6] *Order Affirming and Adopting Initial Decision*, Docket Nos. RP76–136 and RP77–26 (Aug. 30, 1979), *reprinted in* Record at 4728A. The Commission slightly modified this order by changing the amount of interest Transco was to pay on refunds, *Order Amending Prior Order*, Docket Nos. RP76–136 and RP77–6 (Sept. 27, 1979), *reprinted in* Record at 4829–30.

The refunds were ordered because Transco has been charging rates based upon its requested 17% return on equity. Under the Natural Gas Act, a petitioning company may put into effect its requested rates subject to refund, although FERC may suspend the higher rate for up to five months. Natural Gas Act § 4(d), (e), 15 U.S.C. § 717c(d), (e) (1976). *See* note 13 *infra*.

FERC denied rehearing on the rate of return issue. *Notice of Denial of Application for Rehearing and Motion for Stay*, Docket Nos. RP76–136 and RP77–26 (Oct. 24, 1979), *reprinted in* Record at 4839.

[7] *Initial Decision on Zone Rate Differential*, Docket Nos. RP76–136 and RP77–26 (Dec. 19, 1978), *reprinted in* Record at 4468–75.

[8] Opinion No. 59, *Opinion and Order Reversing Initial Decision and Establishing Zone Rates Based Upon Fully Allocated Costs*. Docket Nos. RP6–136 and RP77–26 (Aug. 6, 1979), *reprinted in* Record at 4706–28 [hereinafter referred to as Opinion No. 59]. The Commission

the Commission rejected the decision and, without having found the existing differentials to be unlawful, ordered cost allocation not by zones but by the Mcf-mile method, which attributes cost according to volume and mileage. The change from zones to Mcf-mile would transfer about $15 million in fixed costs from customers in zones 1 and 2 to those in zone 3.[9]

The Commission justified its decision by reference to *Northern Natural Gas Co.*, 14 FPC 11 (1955), *aff'd sub. nom. Interstate Power Co.* v. *FPC*, 230 F.2d 372 (8th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957), where it concluded that distance was the prime determinant of the cost of transporting natural gas.[10] Having decided on that basis that the Mcf-mile method was superior to zone allocations, the Commission then considered whether the cost-shifting effects of the Mcf-mile system should be mitigated because of (1) the historical basis of the Transco system, (2) load concentration and load factor in zone 3, and (3) storage facilities in zone 3 which benefit zone 2 consumers. NYPSC and the zone 3 customers had argued that these factors militated against using the Mcf-mile method.

These parties contend that cost allocations on the Transco system should reflect the fact that the pipeline was built thirty years ago to serve customers in zone 3 and that it would not have been built when it was without those customers. The FERC staff recommended, on this ground, to calculate costs half on the zone method, more favorable to zone 3, and half on the Mcf-mile method. Opinion No. 59 at 7.

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denied a motion for rehearing on this issue, *Notice of Denial of Application for Rehearing and Motions for Stay*, Docket Nos. RP76-136 and RP77-26 (Oct. 4, 1979), *reprinted in* Record at 4869.

[9] Opinion No. 59 at 19.

[10] *Id.* at 5-6.

It is perhaps worth noting that this conclusion led the FPC, in *Northern Natural Gas*, to allocate costs not by the Mcf-mile method, but by zones. 14 FPC at 36. The Northern Natural Gas system had formerly not allocated costs by distance. *Id.* at 20. *See* section III, B *infra*.

The Commission chose not to mitigate the 100% mileage cost allocation on this ground because it found that the capacity of the pipeline had increased by a factor of eight or nine since its construction and therefore the historical roots of the Transco system were of little contemporary relevance. *Id.* at 7. It also commented that it could not impose costs on zone 1 and 2 customers because of factors unrelated to cost. Finally, the Commission observed that the price increase attributable to mileaging in zone 3 would not render Transco's gas less saleable. *Id.* at 8–9.

The zone 3 interests also argued that considerations of load concentration and load factor in their zone should be used to lessen the effect of Mcf-mile cost allocation. The pipeline's ratio of sales in zone 3 to total sales, or load concentration, was 75%, indicating that zone 3 customers accounted for ¾ of Transco's sales. A high load concentration in zone 3 suggests that the pipeline's economies of scale, such as the use of larger-diameter pipe, are largely attributable to zone 3 customers. These customers argued that they should receive the benefit of costs avoided mostly through their use of the Transco pipeline. But the Commission declined to modify the Mcf-mile method, stating that all zones contribute to economies of scale on the Transco system. Opinion No. 59 at 15.

The Commission likewise did not give any weight to the heavier load factor in zone 3. The load factor, which is the ratio of average daily demand to maximum daily demand,[11] was 52% in zone 3, compared to 50% in zone 1 and 36% in zone 2. Opinion No. 59 at 9 n.13. A higher load factor suggests a more efficient use of resources, an effect that one expert source states is "quite pronounced"[12] at load factors up to 60%. The FERC opinion said that the 50% difference in load factors between zones 2 and 3 was not "extreme" enough to warrant a departure from the Mcf-mile method. *Id.* at 14.

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[11] This definition is found in P. Garfield & W. Lovejoy, Public Utility Economics 175 (1964).

[12] *Id.*

A final consideration offered by zone 3 parties was the use of storage facilities in zone 3 to benefit zones 1 and 2. To meet peak demands for gas, Transco pipes gas sold to zones 1 and 2 in summer into storage in zone 3. In the winter, this gas is used in zone 3, and gas sold to zone 3 is delivered to customers in zone 1 and 2. The storage facilities in zone 3 provide systemwide savings because they obviate the need for increased capacity to meet peak winter demand. The Commission chose not to give this factor any weight because it found that this displacement procedure involved no physical transport of gas and therefore no material cost. Opinion No. 59 at 16.

Both zone 2 and zone 3 parties question the Commission's determination of which costs will be included in the Mcf-mile method and thus vary with distance. The Commission included in its Mcf-mile calculations Transco's costs of gathering and transmitting its gas before it reaches the first customer in zone 1, although it did not provide any reasons for that allocation in its opinion. At stake is the proper allocation of $30.5 million in gathering costs. Record at 292. Both Transco and the zone 3 petitioners assert that the cost of these gathering facilities upstream of Transco's closest customer cannot possibly vary with distance.

II

Judicial review of orders such as these is a delicate task. In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), Justice Harlan said that reviewing courts must carefully scrutinize the Commission's decisionmaking process, but defer to its expert judgment:

> The Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act. . . .

390 U.S. at 792. However, Justice Harlan also cautioned courts to remember that

> . . . Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. . . .
>
> . . . [C]ourts are without authority to set aside any rate selected by the Commission which is within a "zone of reasonableness." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585. No other rule would be consonant with the broad responsibilities given to the Commission by Congress; . . .

Id. at 767 (1978).

We think the same balance should be struck in this case. While we must pay proper deference to the expertise of the agency entrusted with administering the Natural Gas Act, and while we cannot substitute our judgment for the Commission's in weighing the relevant factors and the proffered evidence, we cannot, as some of the parties have suggested, limit ourselves to looking at the result. Our responsibility under the Natural Gas Act, § 19(b), 15 U.S.C. § 717r(b) (1976), is to determine whether the Commission, in either of these orders, exceeded or misinterpreted its authority under the Act, and to ensure that "each of the order[s'] essential elements is supported by substantial evidence." 390 U.S. at 791–92.

III

In 1976, when Transco filed for rate increases, it did not propose any change in the allocation of costs according to distance. It was willing to continue using the 1962 differentials that had been included in many prior rate settlements approved by the FPC. The Commission's decision, because it did not determine that the old zone rates were unjust or unreasonable and because it did not provide a reasoned explanation for the departure from settled practice, cannot withstand our scrutiny.

A. The Commission's Authority Under Section 5(a) of the Natural Gas Act

Section 5(a) of the Natural Gas Act, 5 U.S.C. § 717d(a) (1976), provides in pertinent part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that any rate, charge, or classification . . . collected by any natural-gas company . . . or that any . . . practice . . . affecting such rate . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, . . . classification, [or] practice, . . . and shall fix the same by order. . . .

The Commission, then, has the power under the Natural Gas Act to impose its own rates or methods for their calculation upon regulated companies only after finding an existing or proposed rate unjust or unreasonable. The Commission argues that it need not make a section 5(a) determination because Transco itself has filed for new rates under section 4 of the Act.[13] The zone 3 petitioners argue that the

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[13] The relevant portions of section 4 of the Natural Gas Act, 15 U.S.C. § 717c (1976), provide:

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
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> . . . .
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> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission. . . .
>
> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its

Commission must comply with section 5(a) and that its failure to do so denies "Transco's existing zone differentials the substantive consideration they deserved." Zone 3 Customers' Br. at 12. We agree.

The Commission seems to be operating under the notion that it has the choice of proceeding under section 4 or section 5 of the Act. But this court and others have consistently interpreted the Natural Gas Act as offering no such choice. Justice Harlan said, almost a quarter of a century ago, that

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> own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

> . . . the very premise that §§ 4(d) and (e) and 5(a) are alternative rate-changing "procedures" is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, . . . and all rates are subject to being modified by the Commission upon a finding that they are unlawful. . . .
>
> The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, . . . to be "unjust . . .". This is neither a "ratemaking" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies, and if they are determined to be unlawful, to remedy them.

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332, 340–41 (1956). This interpretation is in accord with the legislative history of the Natural Gas Act, which states that it is section 5(a) that "authorizes the Commission . . . to fix charges and reasonable rates. . . ." H.R. Rep. No. 709, 75th Cong., 1st Sess. at 5 (1937).

The decisions of this and other courts and of the Federal Power Commission itself have recognized that the Commission's power to set rates or their method of calculation is derived from section 5(a). This court has said, in the context of gas supply curtailment, that "[f]or the purpose of imposing an alternate plan, section 5 is necessary . . . . [N]owhere in section 4 is there granted the power to impose alternate rates." *City of Willcox* v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).[14] The Fifth Circuit, in *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826, 832 (5th Cir. 1977), declared that the

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[14] For other cases following this interpretation of section 5(a), see, *e.g.*, FPC v. Louisiana Power & Light, 406 U.S. 621 (1972); Sebring Utilities Comm'n v. FERC, 591 F.2d 1003 (5th Cir.), *cert. denied*, 100 S.Ct. 167 (1979); State of Louisana v. FPC, 503 F.2d 844, 861 (5th Cir. 1974); American Smelting and Refining Co. v. FPC, 494 F.2d 925, 933 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974).

FPC "had no statutory authority to impose its own curtailment plan . . . absent its compliance with the procedural and substantive standards of section 5." The Commission itself, in its landmark case establishing zoned cost allocations, *Northern Natural Gas Co.*, 14 FPC 11 (1955), recognized that its power to reject NNG's existing uniform rates and substitute its own zone rates was based upon section 5(a). 14 FPC at 19. The FPC also said that "[t]he fact that this proceeding was initiated under the primary authority of section 4(e) of the Act is immaterial." *Id.* at 19 n.8.

The confusion over the statutory powers of the FPC and its successor, FERC, is perhaps based upon the curtailment cases and the context in which they arose. The FPC, to avoid the delays in processing curtailment plans that would be engendered under section 5, had ordered natural gas companies to file their own curtailment plans under section 4, giving itself the option of converting the section 4 filing to a section 5(a) proceeding if it found the proposed plans unfair or discriminatory. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 643–45 (1972). In later years, the FPC continued this practice, but reviewing courts closely monitored the Commission's orders to file plans to ensure that they were not so "coercive" as to dictate a particular plan to a natural gas company. *See, e.g., Sebring Utilities Comm'n* v. *FERC*, 591 F.2d 1003, 1015–16 (5th Cir.), *cert. denied*, 100 S.Ct. 167 (1979). The courts were concerned lest the Commission impose its own curtailment plans without following the formalities prescribed by section 5(a). To prevent section 5(a) from being undermined, reviewing courts approved curtailment plans filed under section 4 only if they were the product of the company's own decision. When reviewing courts found that the plans had in fact been dictated by the Commission and that section 5(a) procedures had not been followed, they did not hesitate to vacate those plans. *See, e.g., State of Louisiana* v. *FPC*, 503 F.2d 844, 861 (5th Cir. 1974). The Commission, therefore, never had the choice of imposing its own curtailment plans under section 4 or section 5(a). The curtailment cases approved only the Commission's authority to order regulated

companies to file *their own*, not the Commission's plans under section 4.

The Commission contends that it need not observe section 5(a) procedures because this case was commenced by Transco's filing for higher rates under section 4(e), which places the burden of proof upon the petitioner. But section 4(e) places upon the petitioner the burden of justifying its higher rates only when the petitioner has proposed an increase in rates.[15] Therefore, we agree that Transco had the burden of proof on the rate of return question,[16] but we cannot accept the proposition that because a company files for higher rates, it bears the burden of proof on those portions of its filing that represent no departure from the status quo.

The Commission's reading of section 4(e) is inconsistent with the text of the statute, the legislative history, and sound regulatory policy. Section 4(e) states that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, . . ." The emphasis is on making the petitioner justify the changes in rates, not the constant elements. With like import, the legislative history states that the "burden of proof is placed upon the natural-gas company to justify increase in rates." H.R. No. 709, 75th Cong., 1st Sess. at 5 (1937). The zone allocations in dispute here were no part of Transco's argument for higher rates. Forcing the petitioning company to justify not only the novel portions of its petitions but the unchanged parts as well would seriously increase the burden upon these regulated companies without any corresponding improvement in reasoned decisionmaking.

Even if we assume that Transco bore the burden of proof in justifying its existing zone allocations, we would be unable to find the Commission's action outside the ambit of section 5(a). At most, section 4(e) would give the Commis-

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[15] *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 645 (1972); FPC v. Tennessee Gas Co., 371 U.S. 145, 152 (1962); American Louisiana Pipe Line Co. v. FPC, 344 F.2d 525,529–30 (D.C. Cir. 1965).

[16] *See* note 27 *infra*.

sion authority to vacate a submission in favor of the prior rate schedule. It can never be used by FERC as authority to impose any new rate for which a regulated company did not petition. If the Commission seeks to institute its own rates, it has no alternative save compliance with section 5(a).

We must now decide whether the Commission followed the procedures of section 5 in replacing zoned cost allocations with the Mcf-mile method. Before the Commission, consistent with section 5(a), could move to the Mcf-mile method, it had to determine that the previous zone differentials were "unjust, unreasonable, unduly discriminatory, or preferential," a determination that must be supported by substantial evidence and in respect of which the Commission bears the burden of proof.

At the outset we are confronted by the Commission's failure in Opinion No. 59 to conclude explicitly that the old zone differentials are unjust or unreasonable. The opinion did state that "[t]he Commission . . . finds that no adequate or proper basis has been shown to justify the continued application of previously negotiated settlement rate differentials . . ." Opinion No. 59 at 5. We think that this statement does not qualify as a finding that the zone differentials can be voided under section 5(a), because section 5(a) places the onus of invalidating the existing method on the Commission. It is not enough that the petitioners failed to prove that the zone differentials are just and reasonable. It is the Commission which must adduce substantial evidence tending to show that the existing zone rates are unjust and unreasonable. Its failure to do so is fatal,[17] because it lacks

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[17] The Commission argues on appeal that the zoned rates are facially unfair and unjust because they are nothing more than agreed-upon numbers without any basis in cost allocation methodology. The mere fact that these numbers resulted from settlement is not enough to prove that they are unjust or unreasonable when evidence has been introduced tending to show that they more accurately reflect cost incurrence on the Transco system than the Mcf-mile method. *See* section III, B *infra*.

In addition, we would have serious difficulty upholding the Commission on the basis of this argument, because it was first explicitly made

the authority to substitute one rate for another without adhering to the requirements of section 5(a).

B. THE COMMISSIONS'S BURDEN UNDER THE *COLUMBIA GAS* RULE

Last year this court held that the Federal Energy Regulatory Commission "bears the burden of explaining the reasonableness of any departure from a long standing practice, and any facts underlying its explanation must be supported by substantial evidence." *Columbia Gas Transmission Corp.* v. *FERC*, No. 77-1627, at 14 n.31 (D.C. Cir. May 17, 1979).

We are faced with the threshold issue of the relevance of the *Columbia Gas* rule to this proceeding. The Commission urges that *Columbia Gas* is inapplicable here because the 1962 differentials were merely numbers that did not reflect a recognized methodology and because Commission approval of settlements incorporating the zone allocations does not constitute a settled practice.

The purported distinction between a recognized method and an agreed-upon set of numbers cannot suffice to remove this case from the ambit of *Columbia Gas*, because the same type of agreed-upon numbers were at issue there. In *Columbia Gas*, the Commission had departed from use of the *Seaboard* method, which allocated costs equally between the demand charge, which is a fixed charge, and the commodity charge, which varies with the volume of gas consumed, and had instead adopted the *United* method, which changed the split to 25%-75%. *Columbia Gas* at 7 n.12, 9-13. The FERC decision was remanded because this court found that the Commission had not provided a "reasoned explanation" for the switch. *Id.* at 14. But the *Seaboard* cost-allocation method is nothing more than the 50-50 split: an arbitrary number which has been criticized as having little relation to actual cost incurrence.[18]

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by the Commission's lawyers on appeal. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

[18] *See* Lorne, *Natural Gas Pipeline, Peak Load Pricing, and the Federal Power Commission*, 1972 Duke L. J. 85, 99.

Nor is it of any significance that the zone differentials in the instant case are the result of a settlement. The application of the *Seaboard* numbers to the Texas Gas Transmission Corp., the petitioner in the *Columbia Gas* case, was also a result of a settlement. *See Texas Gas Transmission Corp.*, 52 FPC 1930 (1974).

We can now turn to the Commission's Opinion No. 59 to search for the reasoned decisionmaking that justifies the deviation from zone allocations to the Mcf-mile method. Again, it is not sufficient that the petitioners have not justified the existing zone differentials. It is the Commission that must provide the substantial evidence to support its departure from long-standing practice.

The Commission tried to justify the switch to Mcf-mile by stating, as general principles, that "distance of transmission has long been regarded as having the most constant and predictable relation to cost," and that "distance is the prime determinant of . . . cost." Opinion No. 59 at 5–6. While this may well be true, it is simply not relevant to any discussion of the comparative merits of zone and Mcf-mile cost allocation on the Transco system. The question that the Commission faced was not whether it should allocate costs according to distance, but whether, given the particular circumstances of the Transco system, the Mcf-mile method did a better job of accurately reflecting those distance-related costs than did the existing zone differentials.[19]

The proper place for considering the cost-based issues raised by zone 3 parties, such as load factor, load concentration, and zone 3 storage, is in choosing between zone allocations and some other method. In this case, however, the Commission decided first that the Mcf-mile method was superior and then rejected challenges to that.[20] That tech-

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[19] We do not wish to suggest that the Commission may only consider accurate reflection of costs in making these decisions. But if it wishes its order to reflect other ends it must so state. Opinion No. 59 suggests that the Commission was only interested in accurate cost allocation.

[20] We can pretermit any extended discussion of the Commission's treatment of these mitigating factors because we cannot agree with its

nique begs the question to which all parties have a right to an answer: on the Transco system, were the zone allocations more accurate than the alternatives?

We do not concur in the Commission's argument on appeal that the zone allocations were obviously inaccurate because they were the result of a 1962 compromise, rather than of methodical calculation. The fact that parties with adverse interests agreed to those numbers, and continued to do so in later years gives rise to the not unreasonable inference that many parties thought them fair at one time, although, of course, the inability of those numbers to win assent in this proceeding suggests that some of the parties now think otherwise. Further, we do not understand why the Mcf-mile method is obviously superior to the zone method when applied to Transco. While it may be true that cost increases with distance, the Mcf-mile method assigns cost by distance and volume. If there are any economies of scale on the Transco system, then the relationship between

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initial conclusion to move to Mcf-mile cost allocation. But we have reservations about the Commission's handling of some of these matters. While their conclusion that variations in load factor were not "extreme" enough to warrant a departure from Mcf-mile is an exercise of their expert judgment and thus difficult for us to disturb, their discussion of load concentration and zone 3 storage suggests flaws in the Commission's decisionmaking.

The Commission refused to attach weight to the 75% load concentration in zone 3 because it said that all zones contribute substantially to economies of scale on the Transco system. But this is not altogether responsive to the arguments of zone 3 customers, because the issue is not whether all zones contribute, but the relative contributions of the three zones. The inference that the economies of scale are mostly attributable to zone 3 remains unrebutted by the Commission's reasoning.

The Commission also refused to take the zone 3 storage facilities into account, stating that the displacement procedure involved no material cost. But the importance of the zone 3 storage lies not in costs *incurred*, but in costs *avoided*. The FPC has in the past, with the approval of this court, allocated terminal zone storage costs to all zones because the use of the facilities for displacement saved all customers money. Consolidated Gas Supply Corp. v. FPC, 520 F.2d 1176 (D.C. Cir. 1975). If these facilities save Transco and its customers money, it would seem proper that zone 3 customers get some of the benefits.

cost and distance will be far more direct than between cost and volume.[21]

In addition, the inclusion of upstream gathering facilities in the mileaging calculation appears to distort significantly the cost allocation imposed on the Transco system by Mcf-mile. The Commission, in its Opinion No. 59, does not provide any basis for concluding that Transco incurs more upstream costs in serving zone 3 than zone 2 customers. Although we remain deferential to reasoned decisionmaking by an expert agency, it would appear that costs incurred upstream of Transco's first customer vary little, if at all, with the comparative distances of Transco customers.[22]

Finally, the record contains evidence that tends to prove the relative superiority of the zone allocation system as a more accurate reflection of cost incurrence. *See* Record at 1026–30, 2497. While this evidence is certainly open to dispute, it does suggest that the zone allocation figures are not facially absurd and that they deserve the reasoned consideration that the *Columbia Gas* rule seeks to provide.

We conclude, therefore, that the Commission's order directing the change to a mileage-McF allocation of costs is invalid. That is so in the first instance because of the Commission's disregard of the procedural requirements of section 5(a). The Commission erred in (1) placing the burden of proof on the opponents of the change in cost allocation rather than upon itself and (2) failing to make the findings that the existing zone rates legally in effect were unlawful.

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[21] We recognize that the zone system also allocates costs by distance and volume. But the existence of economies of scale on the Transco system suggests that costs should not rise quite as rapidly for increases in volume as for distance. Thus, the lesser differentials of the zone system may reflect more closely, although still inaccurately, the ameliorative effect of economies of scale than would the Mcf-mile method.

[22] We need not decide the question of the allocation of administrative and general transmission costs by volumetric, rather than Mcf-mile, calculation, because we have not been able to uphold the Commission's determination that any form of Mcf-mile cost allocation is appropriate on the Transco system.

Without such findings, section 5(a) does not empower the Commission to prescribe a different method of cost allocation affecting differential rates. In any event, the evidence of record supporting that prescription falls short of substantiality.

IV

The Commission determination of 14% as a reasonable return on Transco equity for the eleven-month "locked-in" period faces attack from two sides. On one flank, NCUC argues that the rate of return is too generous because the decision did not take into account Transco's allegedly inept management and unused facilities. On the other, Transco contends that the Commission's determination is neither supported by substantial evidence nor consonant with *Columbia Gas*.

The Commission dismissed NCUC's contentions of inept management and unused facilities on the grounds that the petitioner had not introduced any evidence to support these claims. Initial Decision at 7 n.5. NCUC had argued that the depth of curtailment of service on the Transco system suggested both conclusions, but the Commission concluded that mere curtailment, even to 50% capacity, did not of itself establish bad management or idle facilities. We find nothing in the record to warrant our disturbance of the Commission's judgment.

In support of its claim that the 14% is too low, Transco first argues that it is not possible to trace the path by which the ALJ, and thus the Commission by adoption of the ALJ initial decision, arrived at the 14% figure. We think it is. We begin with the testimony, on which the ALJ primarily relied, of the staff's expert witness, who had himself concluded that 14% was a reasonable figure.

The staff expert compared the risks facing Transco with those facing other regulated companies. He divided risks between the possibility of business reverses, which is called business risk, and financial risk, which varies with the amount of debt and preferred stock and thus with the size of the firm's interest and dividend obligations. Record at

163–64. While it is not in dispute that Transco's relatively thin equity ratio[23] of 24.1% indicates a higher level of financial risk and thus justifies a higher level of return on equity than other pipelines, there is considerable disagreement concerning the degree of business risk that Transco faces.

The staff witness suggested that the two types of risk are related: a regulated utility such as a pipeline company with a relatively low business risk but a relatively higher financial risk may still attract investors. Record at 164. This appears sensible, since a company looking forward to consistent profitability can worry less about high fixed interest charges or dividends that would constitute a threat to the solvency of the firm should profits evaporate. Thus, a high level of financial risk is relatively less important to a firm, such as a regulated pipeline, with a relatively low business risk.

The staff witness found that Transco's business risks, chiefly related to the possibility of gas supply shortages, were lessening because the company's exploration program was expected to produce improved supplies. Record at 167–68. However, the staff witness found Transco's business risks to be slightly above average. Having found Transco's business and financial risks to be somewhat higher, although not remarkably so, than other pipelines whose allowed rates of return fell between 13.5% and 13.75%, the staff witness recommended a rate of return of 14%.[24] Record at 168; Initial Opinion at 9–10.

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[23] Equity ratio is the percentage of common equity to total capital. Transco's capital structure in 1977 was 63% long-term debt, 13% preferred stock, and 24% common stock. Initial Opinion at 6 n.4.

[24] Transco assigns as error the ALJ's dismissal of Transco's evidence. The ALJ had refused to credit the Transco witness's comparison of Transco with electric utilities because, according to the ALJ, electric utilities are entitled to a higher rate of return because of their greater capital requirements. Transco on appeal claims that the Commission has traditionally thought of gas pipelines as riskier than electric utilities and thus the ALJ's reasoning is unsupportable.

We do not think that the ALJ's assertion, if it is in fact flawed, would be fatal to the Commission, because substantial evidence supports the portions of the ALJ's decision that justify a 14% return. The

The Initial Opinion also takes note of Transco's "modest prosperity" despite chronic natural gas shortages as justifying a rate of return no higher than 14%. *Id.* at 9. By this the ALJ is apparently referring to Transco's earnings compared to those of other major pipeline companies. Except for 1974, an aberrationaliy bad year, Transco consistently earned more on its equity than the pipeline average, Exhibit No. 17 at 2.[25] Its earnings per share also increased from 1974 to 1976. Record at 482.

Transco presented its own witness who came to rather different conclusions. The Transco witness found the company's business risks related to gas supplies "five [or] ten—fifteen years down the road" more significant than had the staff witness. Record at 464. The ALJ, noting that the rates in question were locked in for only an eleven-month period, refused to attach weight to the possibilities of natural gas shortages five to fifteen years from the time when the rates in this docket were applicable.

Transco objects that the Commission is departing from past practices in refusing to consider long-term risks in a locked-in rate proceeding. We think that Transco misperceives the thrust of the relevant cases it cites.[26] Those cases held that the Commission should look to the long-

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staff witness's estimate was adopted, and the Transco witness's estimate was not, because the ALJ and the Commission concluded in an exercise of their expert judgment that the staff witness's estimate of the risks facing Transco compared to those facing other gas pipelines was superior to the estimate made by Transco's witness. The dispute facing the ALJ turned on Transco's risk to investors, not whether this risk was more or less than that of electric utilities.

[25] There were two minor errors in the first version of this exhibit which, when corrected, indicated that comparable pipelines actually earned less on their equity than had been first stated. Thus, the corrected version makes Transco's performance relative to comparable pipelines look even better.

[26] See Municipal Light Boards v. Boston Edison Co., 53 FPC 1543, 1556 (1975); American Louisiana Pipe Line Co., 28 FPC 482, 486 (1962). It is also possible that the practice is not quite as settled as Transco contends, given the number of relevant cases to which it could point.

term cost of raising capital and other pertinent risks even when it is considering locked-in rates. The rationale of these cases is unexceptionable: a regulated company faces the same long-term problems regardless of the frequency of its rate filings. To look only at short-term risks and costs in considering a locked-in rate raises the possibility that the company will never be adequately compensated for long-term risks and costs present during the locked-in period.

But the administrative law judge did not dismiss the risk of gas supply shortages solely because he was deciding a locked-in rate. He concluded that the risk was not likely to arise at all during the locked-in period. The long-term costs of raising capital and the pertinent risks of confronting the company when it makes its request are ongoing factors present during the locked-in period. The risk of gas supply shortages ten or fifteen years from the locked-in period may well not concern investors at all during the locked-in period. The ALJ's opinion also suggests that he found the risk too speculative and thus not pertinent to Transco's petition. Given the testimony of the staff's witness that Transco's supply situation should improve, the ALJ was acting well within his expert judgment in disregarding the conjectures of Transco's witness.

Transco also attempts to persuade us that the Commission's 14% determination is deficient under the *Columbia Gas* rule,[27] because the Commission had thrice before ap-

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[27] We think that the Commission complied with the requirements of sections 4(e) and 5(a) of the Natural Gas Act in making its rate-of-return determination. Reading sections 4(e) and 5(a) together, we conclude that the Commission is not obliged to bear the burden of proving a change resulting from higher rates unjust. It need only conclude that the petitioner has failed to carry its burden of proof. Against a background of obvious conflict in credible testimony, the conclusion that Transco failed to carry its burden is inherent in the Commission's determination that any rate higher than 14.3% falls outside the zone of reasonableness.

However, when the Commission not only voids a proposed rate increase, but institutes a rate of its own under section 5(a) rather than continuing the old rate in effect, it must adduce substantial evidence to prove (1) that the old rate is unjust and unreasonable and (2) the Com-

proved Transco settlements that included a 14.75% rate of return and had allowed pipelines with thicker equity ratios returns between 13.5% and 13.75%. We do not think that *Columbia Gas* can be applied as Transco has suggested.

The contrast between the situation facing the decision-maker in *Columbia Gas* and in this case is illuminating. In *Columbia Gas*, the Commission was choosing between present practice and a discrete alternative. Here the ALJ faced an infinitude of choices from a low of 13.5% to a high of 17% without any distinct point of departure. He was confronted with evidence and precedent suggesting that almost any figure he chose in that range would find some support. Based on expert testimony, he picked 14% as the most reasonable rate within a zone of reasonableness extending from 13.5% to 14.3%.

It could not be said that earlier practice had been opposed to his judgment. The Commission approved settlements of 14.75% rate as just and reasonable, but did not indicate that neighboring figures might not also be just and reasonable, or even more just and reasonable. The other cases all involved facts to some extent different from those at issue here; the weight to give those differences was ultimately unquantifiable and reserved for expert judgment.[28]

Extension of *Columbia Gas* in the manner suggested by Transco would lead the Commission into a swamp of past decisions of varying degrees of relevance with widely scattered outcomes. The Commission could be caught in a withering cross-fire, with some litigants demanding adherence

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mission's proposed rate is just and reasonable. The Commission's conclusion that only rates between 13.5% and 14.3% are just and reasonable and the substantial evidence that supports it fulfill the requirements of section 5(a) on both necessary findings.

[28] The relevance of FERC approval of rates of return of between 13.5% and 13.75% on equity ratios of 36% to 37% in other cases is especially suspect. The staff's expert had said that variations in financial risk vary in importance with the degree of business risk. Having found Transco's business risk just slightly above average for pipelines, and thus far safer than unregulated enterprises, the ALJ acted reasonably in granting only a slightly higher rate of return for Transco's markedly thinner equity ratio.

to past settlements involving *this* company, and others demanding adherence to rates involving similar firms, or even, as Transco asks here, substantial departure from rates granted to dissimilar firms on the grounds that failure to pay adequate heed to the differences constitutes departure from settled practices.

We think that the burden this court placed upon the Commission in *Columbia Gas* to explain its switch from one method to a discrete alternative was reasonable. We think that making the Commission explain why it did not choose every other plausible result when it is faced with a multitude of possible outcomes and with precedents whose relevance is a matter of judgment and which do not suggest any one settled practice is both unreasonable and unlikely to advance the cause of reasoned decisionmaking.

Our task in reviewing the reasonableness of a particular rate of return, therefore, is not to see whether it nestles closely to past decisions on a plot of rates of return against equity ratios, but to ensure that the Commission's judgment is supported by substantial evidence and that the methodology used in arriving at that judgment is either consistent with past practice or adequately justified under the *Columbia Gas* decision. Having concluded that the Commission decision was supported by substantial evidence, we need only examine whether the methodology used by the Commission was in keeping with past practice. In this case, there is no dispute that the Commission's expert witness used the traditional comparable earnings and risk tests. Indeed, Transco's witness used the same methodology, Transco Br. at 15–17, but arrived at different conclusions because he judged the risks rather differently. The Commission's reliance upon settled methodology is all that is required to fulfill the standards of *Columbia Gas*.

V.

The partial stay of December 11, 1979 provided that the higher rates collected from zone 3 customers would be held by Transco in an escrow fund, to be distributed to customers in zones 1 and 2 if Opinion No. 59 were to be upheld and

to zone 3 customers if Opinion No. 59 were to be reversed. Since we have reached the conclusion that FERC's rate of return order may stand, while its cost allocation order and opinion must be reversed,[29] the December 11 order requires those monies, plus earnings, held in escrow by Transco be distributed, as contemplated by the court, to the customers in sales zone 3.

It is so ordered.

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[29] Our reversal on the cost allocation issue allows us to pretermit resolution of the propriety of the exclusion of LILCO's marginal cost evidence from the proceedings leading up to the adoption of the Mcf-mile method. *See* Record at 745–46, 760–83. Similarly, we are not confronted with the Commission's refusal to apply the lower Mcf-mile rates retrospectively in zones 1 and 2.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 79-2182

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

COMMONWEALTH GAS PIPELINE CORP., CAROLINA PIPELINE CORPORATION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

79-2183

NORTH CAROLINA NATURAL GAS CORPORATION PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. PIEDMONT NATURAL GAS COMPANY, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CAROLINA PIPELINE COMPANY, COMMONWEALTH GAS PIPELINE CORPORATION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, TRANSCONTINENTAL GAS PIPE LINE CORP., BROOKLYN UNION GAS CO., ET AL., COLUMBIA GAS TRANSMISSION CORP., WASHINGTON GAS LIGHT COMPANY, ATLANTA GAS LIGHT COMPANY, INTERVENORS

79-2184

NORTH CAROLINA UTILITIES COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CAROLINA PIPELINE COMPANY,
COMMONWEALTH GAS PIPELINE CORPORATION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
TRANSCONTINENTAL GAS PIPE LINE CORP.,
BROOKLYN UNION GAS CO., ET AL.,
COLUMBIA GAS TRANSMISSION CORP.,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
INTERVENORS

79-2195

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE CORP.,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
NORTH CAROLINA UTILITIES COMMISSION,
CAROLINA PIPELINE COMPANY,
COMMONWEALTH GAS PIPELINE CORPORATION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
BROOKLYN UNION GAS COMPANY, ET AL.,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY, INTERVENORS

79-2213

THE BROOKLYN UNION GAS COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE CORP.,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
COMMONWEALTH GAS PIPELINE CORPORATION,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
NORTH CAROLINA UTILITIES COMMISSION,
WASHINGTON GAS LIGHT COMPANY,
ATLANTA GAS LIGHT COMPANY, INTERVENORS

79-2322

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CAROLINA PIPELINE COMPANY,
NORTH CAROLINA NATURAL GAS CORP., ET AL.,
BROOKLYN UNION GAS COMPANY, ET AL., INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: McGOWAN, WILKEY and WALD, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Energy Regulatory Commis-

sion and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Federal Energy Regulatory Commission on review herein which pertains to the rate of return issue is affirmed, and the order of the Commission on review herein dealing with cost allocation is set aside, all in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ _____

GEORGE A. FISHER
Clerk

Date: September 24, 1980

Opinion for the Court filed by Circuit Judge McGowan.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 79-2182

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

COMMONWEALTH GAS PIPELINE CORP.
CAROLINA PIPELINE CORPORATION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

AND CONSOLIDATED CASES

[Filed Dec. 18, 1980]

Before: McGOWAN, WILKEY and WALD, *Circuit Judges*

ORDER

Upon consideration of the petition for rehearing filed by respondent Federal Energy Regulatory Commission, it is hereby

ORDERED, by the Court, that the Opinion for the Court, filed on September 24, 1980, be amended as follows:

On page 20 of the slip opinion, strike the second paragraph and insert in lieu thereof the following:

> Transco's filing of a rate change continued to incorporate the existing zone rate differentials. Had Transco proposed any changes in them, the Commission, acting under section 4(e), could have approved the changes in whole or in part. Section 4(e), however,

cannot be used by the Commission to institute any change in a ratemaking component, such as cost allocation, that does not represent at least partial approval of the change for which the enterprise had petitioned in its filing. If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of section 5(a).

And it is,

FURTHER ORDERED, by the Court, that, except as the Opinion for the Court is being amended by this order, respondent Commission's petition for rehearing is denied.

Per Curiam

For the Court:

/s/

GEORGE A. FISHER
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 79-2182

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

COMMONWEALTH GAS PIPELINE CORP.
CAROLINA PIPELINE CORPORATION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
INTERVENORS

AND CONSOLIDATED CASES

[Filed Dec. 18, 1980]

Before: McGOWAN, WILKEY and WALD, *Circuit Judges*

ORDER

Upon consideration of the petitions for rehearing filed by petitioners Transcontinental Gas Pipe Line Corporation, North Carolina Natural Gas Corporation, et al., and North Carolina Utilities Commission, and of the petition for rehearing filed by intervenor Atlanta Gas Light Company, it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

For the Court:

/s/
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-2182

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPDONENT

COMMONWEALTH GAS PIPELINE CORP. CAROLINA PIPELINE CORPORATION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

AND CONSOLIDATED CASES

[Filed Dec. 18, 1980]

Before: WRIGHT, *Chief Judge;* MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*

ORDER

The suggestions for rehearing *en banc* filed by petitioners Transcontinental Gas Pipe Line Corporation, North Carolina Natural Gas Corporation, et al., and North Carolina Utilities Commission, by respondent Commission, and by intervenor Atlanta Gas Light Company having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

/s/ _____

GEORGE A. FISHER
Clerk

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP76-136
and RP77-26

OPINION NO. 59

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

OPINION AND ORDER REVERSING INITIAL DECISION AND ESTABLISHING ZONE RATES BASED UPON FULLY ALLOCATED COSTS
(Issued August 6, 1979)

Before Commissioners:

Charles B. Curtis, Chairman;
Georgiana Sheldon, and Matthew Holden, Jr.

This proceeding was initiated on July 30, 1976, when Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing in Docket No. RP76-136 a general rate application requesting an increase of $81.3 million annually for jurisdictional natural gas sales and services.[1] On August 30, 1976, the FPC accepted the proposed increase for filing, suspended its use for five months until February 1, 1977, and set the matter for hearing. Transco's filing in Docket No. RP77-26, proposing an increase in interruptible transportation rates, was submitted on December 30, 1976, and was suspended and set for hearing by the FPC on January

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[1] This proceeding was commenced before the Federal Power Commission (FPC). By the joint regulation of October 1, 1977 (10 CFR § 1000.1), it was transferred to the FERC. The term "Commission", when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

31, 1977. The FPC consolidated the two proceedings for purposes of hearing and decision.

By order of June 27, 1978, the Commission approved a settlement agreement in these proceedings, but set the zone rate differential issue for hearing.[2] Following the hearing and submission of briefs, the judge issued his initial decision on the zone rate differential issue on December 19, 1978. The judge approved the historical zone rate differentials which have been in effect on Transco's system since 1962. These differentials amounting to 2.8 cents per Mcf between zones 1 and 2 and 3.6 cents per Mcf between zones 2 and 3, were approved by the FPC as part of a settlement of Transco's rate proceedings in Docket No. RP61-13, 27 FPC 187 (1962), and have remained in effect since that time.[3] Zone 3 interests[4] support the judge's decision. Zone 1 and

[2] The settlement resolved all issues in these proceedings except four: (1) rate base treatment of certain advance payments, (2) rate base treatment for unsuccessful alternate gas supply costs, (3) rate of return on equity and (4) carrying charges on unrecover demand charge credits. The issue of rate base treatment for certain advance payments was severed from this proceeding by order issued October 21, 1977, and is to be resolved in the consolidated proceeding in *Transcontinental Gas Pipe Line Corporation*, Docket Nos. RP 74-48 and RP 75-3 (AP76-1) *et al.* The unsuccessful alternate gas supply costs issue was decided on June 20, 1979, when the United States Court of Appeals for the District of Columbia Circuit, in *Transcontinental Gas Pipe Line Corporation* v. *Federal Energy Regulatory Commission*, No. 77-1712, affirmed the Commission in excluding from Transco's rate base expenditures for unsuccessful alternative gas supply projects. The remaining two issues of rate of return and carrying charges on unrecovered curtailment credits are the subjects of an initial decision issued February 13, 1978. These two issues will be considered in a separate order.

[3] Transco's system is a major long-line natural gas transmission system originating in the Texas and Louisiana gas supply areas and extending, through three sales rate zones, to its terminus in the New York City metropolitan area. Zone 1 extends from approximately the Mississippi-Louisiana border through Alabama to the Georgia-South Carolina border. Zone 2 includes South Carolina, North Carolina, Virginia, and Washington, D.C. Zone 3 includes Maryland, Delaware, Pennsylvania, New Jersey and New York.

[4] New York Public Service Commission, Delmarva Power and Light Company, Philadelphia Gas and Water Company, Philadelphia Gas

zone 2 interests[5] oppose the continued use of the historical differentials and advocate instead unadjusted zone rates resulting from an Mcf-mile[6] (or dekatherm-mile)[7] allocation of transmission costs to zones. The staff, in its brief on exceptions, continues to favor a compromise approach which would give 50 percent weight to mileage and 50 percent weight to the historical rate differentials. Transco strikes a neutral posture, with its primary concern being that any change in the historical differentials be applied prospectively so as to avoid the danger of undercollections. For the reasons set forth below, we reverse the judge's decision and hold that the rates for each of Transco's three sales rate zones should be based upon fully allocated costs without regard to the settlement based differentials previously in effect.

DISCUSSION

The single issue before us is what should be the zone rate differentials on the Transco system. Upon review of the

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Works, and the Zone 3 Customer Group (The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric and Gas Company, and South Jersey Gas Company, all distributor customers of Transco, and National Fuel Gas Supply Corporation, a pipeline customer of Transco).

[5] North Carolina Utilities Commission, Atlanta Gas Light Company, and the North Carolina Companies (Piedmong Natural Gas Company, Inc., Public Service Company of North Carolina, Inc., and North Carolina Natural Gas Company).

[6] The Mcf-mile method treats a pipeline's transmission system as an integrated whole with transmission costs varying in relation to distance. It uses as the basis of cost that of the entire system, and, as the basis of allocation, the volumes of sales weighted by the distance the gas travels to each delivery point.

[7] In this proceeding Transco changed its tariffs from a volume (Mcf) basis for measurement of gas to an energy (dekatherm) basis of measurement. A dekatherm (Dth) is a thermal unit of energy equal to 1,000,000 Btu and is equivalent of one Mcf having a heating content of 1000 Btu. In this opinion we refer to both Mcf's and Dth's since not all of the data in the record are stated in dekatherms. Accordingly, references to Mcf are intended to encompass references to Dth and, in this case, this has no effect on our disposition of the issue at hand.

record in this proceeding, the Commission finds that rates resulting from the allocation of Transco's transmission costs to zones using the Mcf-mile method are just and reasonable and represent a proper apportionment of transmission cost responsibility between and among Transco's customers. The Commission further finds that no adequate or proper basis has been shown to justify the continued application of previously negotiated settlement rate differentials or the cost allocation methods implicit in the use of such differentials.

The Mcf-mile method is the cost allocation method which has most often been employed by the Commission for the purpose of allocating transmission costs on major long-line natural gas transmission systems such as Transco's.[8] Of all the factors which bear on this issue for a system like Transco's, distance of transmission has long been regarded as having the most constant and predictable relation to cost. In *Northern Natural*, 14 FPC 11, the FPC observed that distance of haul is a principal factor relied upon by the Interstate Commerce Commission in setting transportation rates for common carriers subject to its jurisdiction.[9] The FPC likewise concluded that distance is the primary determinant of the cost of transporting natural gas.[10] The FPC expressed its decision on this matter as follows:

> . . . it is a simple economic fact that the delivery cost of natural gas increases in close proportion to the length of the transmission line of any given size. Therefore, unless other circumstances are present which outweigh the importance of the length of trans-

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[8] See *Texas Eastern Transmission Corporation*, Opinion No. 21 issued August 9, 1978, Docket No. RP74-41; *Texas Gas Transmission Corporation*, Opinion No. 792 issued April 11, 1977, Docket No. RP75-19, *vacated and remanded on other grounds Columbia Gas Transmission Corporation et al.*, Nos. 77-1627 and 77-1631 (D.C. Cir. May 17, 1979); *Southern Natural Gas Company*, Opinion No. 379, 29 FPC 323 (1963); *Tennessee Gas Transmission Company*, Opinion No. 352, 27 FPC 202 (1962); and *Northern Natural Gas Company*, Opinion No. 281, 14 FPC 11 (1955).

[9] 14 FPC 11 at 23.

[10] *Id.* at 24.

> mission required to effect delivery, the distance factor is the prime determinant of the cost of rendering service. Since in our view of this record there are no such circumstances present to counter-balance the distance factor, we conclude that the distance of transmission required to effect deliveries at the various points of sale by Northern reflects with reasonable accuracy the relative cost of providing service to its customers. (14 FPC at 24).

Thus, distance is the prime determinant of the cost of rendering transmission service unless some other factor or combination of factors can countervail the importance of the length of transmission. In this proceeding the zone 3 interests argue that factors which countervail distance include (1) historical considerations, (2) load concentration and load factor, and (3) the value of storage fields located in zone 3. We shall consider these arguments *seriatim*.

HISTORICAL FACTORS

Zone 3 witness Benson testified that the Transco system was originally certificated in 1948 to provide sales and service to the terminal zone markets in New York, New Jersey, and Pennsylvania and that the pipeline would not have been built were it not for these markets. (Tr. 277). Zone 3 argues this contribution must be recognized and considered in deciding the zone rate differential issue.

The Commission cannot agree. To give serious consideration to this non-cost factor in a rate proceeding approximately 30 years later would be inequitable and illogical. As pointed out by zone 2 witness Clay, the original certificated capacity of the line was 340,000 Mcf per day and has gone up by a factor of 8 or 9 since then. (Tr. 681; 1156). Transco's revenue requirements result from the expenses and investments associated with the facilities in service during the locked-in period involved here.[11] The cost consequences of

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[11] The rates in this proceeding went into effect February 1, 1977 and remained in effect until January 1, 1978, when they were superseded by the rates filed by Transco in Docket No. RP77-108.

such facilities and their operation should be fully reflected in rates absent some countervailing consideration or policy. Zone 3's origin-of-the-system argument does not, in the Commission's judgment, provide an adequate basis for departing from the principle of cost based rates.

The staff proposed an approach which would give 50 percent weight to mileage and 50 percent weight to historical zone rate differentials. The staff was concerned, among other things, that in using a 100 percent Mcf-mile method, virtually all of Transco's rate increase would be assigned to zone 3 customers. The staff argues that its recommendation would mitigate the impact of a 100 percent Mcf-mile allocation and would give some recognition to the historical development of the system. (Tr. 119–120). However, the staff's witness later testified with reference to zone 3's historical argument that "while it makes interesting reading, I don't believe that you could apply that to the situations that exist today." (Tr. 914). The staff's primary concern appeared to be in mitigating the impact on zone 3 customers of the Mcf-mile allocation method.

Upon review of this matter, the Commission declines to give any substantial weight to historical considerations such as those cited by zone 3 interests.[12] In addition to our comments above concerning the origin of the system, we note that the historical zone rate differentials were the result of negotiated settlements among Transco and its customers. There is no persuasive evidence on this record that the historical differentials are based upon or adequately reflect cost considerations and they are impaired by that inadequacy. The FPC's prior approval of the historic zone rate differentials in the original and succeeding settlements cannot be accorded precedential weight.

As to the staff's concern for mitigating the impact of a 100 percent Mcf-mile method, we find no such mitigation is warranted. It is not equitable, absent some significant policy consideration, to mitigate the effect of cost based rates

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[12] See *Texas Eastern, supra*, at 14–19, where we also rejected similar arguments.

on the zone 3 customers by imposing unjustified costs on zone 1 and zone 2 customers. Where the Commission has in prior cases modified an Mcf-mile approach by giving some weight to historical rate design, it has done so primarily to avoid unduly disrupting the pipelines' marketing patterns and ability to compete with alternate fuels. *Southern Natural Gas Company*, 29 FPC 323, 348 (1963); *Tennessee Gas Transmission Company*, 27 FPC 202, 213 (1962). No such concerns are present on this record. Approval of Transco's historical rate differentials would result in an increase in zone 3 rates of approximately $31 million or about 8 percent over present zone 3 revenues of $373 million. Under the rates resulting from Mcf-mile cost allocation, the increase to zone 3 will be approximately $46 million or about 12 percent. (Exhibit 51, Appendix A, page 7 of 10). The impact of the staff's compromise recommendation would fall roughly in between. There is no evidence that the shift in cost responsibility under the Mcf-mile method of allocation would render Transco's natural gas service in zone 3 uneconomical, that Transco would be likely to lose any of its zone 3 markets, or that its marketing patterns would be unduly disrupted. Neither Transco nor any other party makes such a claim. It is therefore clear that the rationale underlying the FPC's decisions in *Southern Natural* and *Tennessee Gas* is not applicable in this case.

LOAD CONCENTRATION AND LOAD FACTOR

The zone 3 interests do not, and indeed cannot, deny the inescapable reality of distance as a significant factor in establishing zone rate differentials on a long-line system such as Transco. However, they contend that the high load concentration and load factor in the terminal zone are of such a magnitude as to offset the importance of distance in determining the cost allocation and related rate differential issues.[13] This is so, they argue, because substantial econo-

[13] The record reflects a load concentration of approximately 75% in the terminal zone. (Tr. 993). Zone 3 witness Benson computed the load factor for the various zones based on test year contract demand sales as follows: Zone 1 (49.89%); Zone 2 (36.12%); Zone 3 (53.35%); and sys-

mies of construction costs and operation expenses are experienced in cases where the pipeline's principal markets are concentrated at or near the terminus of the pipeline. (Tr. 277).

Zone 1 and zone 2 argue that load concentration should be taken into account in deciding whether or not to zone a particular system but should not be used to modify the rates resulting from the approved cost allocation method. (Tr. 681–682). As to economies of scale, zones 1 and 2 argue that such economies occur on Transco's system upstream from zone 3 where the combined loads of all 3 zones exist. (Tr. 686, and 1083–1085).

Zones 1 and 2 argue that the proper place to consider load factor is in the context of the cost classification issue which is a settled issue in this proceeding. They further note that their load factors are artificially lower now due to the effect of curtailment.

Finally, zones 1 and 2 point out that load factor and load concentration have only been given significant weight by the Commission on those systems where a mileage-weighted method of cost allocation was difficult or impossible to implement due to the characteristics of individual pipelines, particularly those which have been found to operate as a grid system rather than a long-line system.

The staff agrees with the zone 1 and zone 2 parties that curtailment has artificially affected load concentration and load factor on the Transco system, and that the effect of the cost classification methodology, which is a settled issue in this proceeding, should not be allowed to offset distance of transmission in determining the proper cost allocation method. The staff also takes the position that the judge's initial decision contravenes Commission precedent holding that distance of transmission is the primary determinant of

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tem average as 48.24%. (See Tr. 281). Mr. Benson did another load factor calculation based on comparative billing demands and annual quantities of Transco's contract demand customers by zones when all sales and services (including storage and peaking services) are included on a composite basis. The results were as follows: Zone 1 (20.69%); Zone 2 (28.50%); Zone 3 (33.05%); and system average as 31.16%. (See Tr. 283).

the cost of transporting natural gas on a long-line system such as Transco. As previously noted, however, the staff would modify the Mcf-mile method solely for the purpose of softening the rate impact of that allocation.

We note at the outset that the issue of cost classification has been settled by the parties in this proceeding using the so called *United* method.[14] (Exhibit 51).

We further note that load concentration and load factor play a significant role in the establishing of zones on a particular system. However, no party has sought a change in Transco's rate zones and that question is not an issue in this proceeding.

Insofar as the issues of load concentration and load factor may be considered as bearing upon the Commission's decision in this case, the Commission is aware that in certain prior cases the FPC has cited these factors in determining cost allocation methods and rates for other pipelines. However a careful review of these decisions reveals that where extreme variation in load size and load factor were given significant weight in the decision, other factors were present which demonstrated that the Mcf-mile method was difficult or impossible to implement in light of the physical characteristics and operations of the pipelines involved.

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[14] *United Gas Pipe Line Company*, 50 FPC 1348 (1973) *rehearing denied* 51 FPC 1014; *aff'd sub nom. Consolidated Gas Supply Corp.* v. *F.P.C.*, 172 U.S. App. D.C. 162 (1975), 520 F.2d 1176 (D.C. Cir. 1975). The *United* method designates 25 percent of the fixed transmission and storage costs and all "as billed" demand charges to the demand category and all remaining fixed costs together with all variable costs are classified to the commodity category. Costs assigned to the demand category—sometimes referred to as "demand costs"—are paid by those customers who have contracted for the right to demand a given quantity at a certain time, whether or not delivery is made. The commodity category of costs relate to costs of gas actually delivered.

We further observe that the *United* formula issue was litigated in the prior case, Opinion 801, *Transcontinental Gas Pipe Line Corporation*, FPC Docket Nos. RP74-48 and RP75-3, issued May 31, 1977, and Opinion 801-A, issued July 29, 1977. None of the parties sought judicial appeal of this issue, although other matters from those proceedings were appealed.

For example, in *Michigan Wisconsin Pipe Line Company*, 34 FPC 621 (1965), the FPC approved the allocation of costs on a system-wide basis and held that separate rate zones should not be established. Heavy load concentration (approximately 95%) and a high load factor (approximately 91%) were found in the proposed terminal zone of the system. Michigan Wisconsin also had substantial storage in the proposed terminal zone which benefited the entire system by displacement just like Transco. However, Michigan Wisconsin also had other factors which impaired the logic of giving primary emphasis to distance and the Commission gave great weight to these factors. These factors included: (1) the fact that at periods of peak demand the flow of some of the gas reversed; and (2) the fact that the system was operated as a grid with natural gas flowing into the system at divergent points and in significant amounts (over 36% of the system's supply) in the proposed terminal zone.

High load concentration (80.5%) and high load factor (almost 100%) in the terminal zone were mentioned as significant factors in *El Paso Natural Gas Company*, 22 FPC 260 (1959). But again there the Commission put heavy stress on the fact that the El Paso system was operated as a grid and therefore found "little logic"[15] in giving primary emphasis to distance. However, unlike the *Michigan Wisconsin* case, *supra*, the Commission did use zones (with differences in rates as applied to the various zones) so as to give some recognition to the distance of haul.[16]

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[15] *El Paso, supra* at 278.

[16] The Commission stated as follows:

> . . .El Paso's system is an integrated one. Not only does gas pass from the Southern Division to the Northern Division, but either division, in effect, bears loads that would have to be carried by the other one. Therefore, there is little logic in computing the exact distance that gas travels from the various producing sources to the various customers. Furthermore, to attempt to determine just what gas goes to each of the several customers would lead to a result discriminatory in application and inherent with discrimination. An appropriate method of regulating this system therefore is to treat it as a unit, and in the first instance to allocate costs irrespective of the source of the gas and

A further example cited by zone 3 parties in support of discounting the element of distance is *Consolidated Gas Supply Corporation*, Docket Nos. RP73–107 *et al.*, Opinion No. 819, issued August 12, 1977. This case clearly does not support zone 3's argument. Here the Commission found that the maximum distance of haul was only slightly greater than the distance of haul in one zone on a long-line pipeline system, that Consolidated has supply inputs throughout its service area, and that gas flows in different directions within Consolidated's system. For these reasons the Commission found the Mcf-mile method could not be applied to Consolidated.

In contrast Transco's gas supply is introduced into the system exclusively in the Louisiana and Texas supply areas and is transported in a single direction from there north and east to the markets located along the system. Transco's system possesses none of the characteristics of a grid system, and in this respect its operations are clearly distinguishable from systems like those of *Michigan Wisconsin*, *El Paso*, and *Consolidated*.

In *Tennessee Gas, supra*, the FPC again stated its policy that distance of transmission is the primary cost determinant and approved the Mcf-mile method in allocating Tennessee's transmission costs. The FPC indicated, however, that the distance factor might be discounted if there were an "extreme" variation in load concentration and load factor between zones.[17]

Upon review of this matter, the Commission concludes that the variations in load concentration and load factor present on this record among Transco's rate zones are not "extreme"[18] and therefore do not warrant a departure from or adjustment to the Mcf-mile method of allocation.

In reaching this decision the Commission notes that load concentration and load factor were also recently rejected as

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irrespective of the distance traveled and then if necessary, as we shall show below, provide differences in rates as applied to the various zones. (*El Paso, supra*, at 278).

[17] *Tennessee Gas, supra*, at 209.

[18] See footnote 13 *supra*.

a basis for modifying the Mcf-mile cost allocations method in a similar case involving *Texas Eastern*, *supra*, wherein the Commission stated (mimeo p. 16):

> . . .even where there exists a concentration of high load factor sales on the downstream portion of a system, that has not necessarily discredited a mileage-related allocation of transmission costs. Thus, for example, in *Texas Gas*, *supra*, the FPC adopted an Mcf-mile allocation of transmission costs notwithstanding the high load factor sales existing in the northern zones of the system and the lower load factor sales in the southern zones (*Texas Gas* at 17).

Finally, zone 3's basic argument is that the load factor and load concentration in the terminal zone result in substantial economies of scale which are of such a magnitude as to offset the importance of distance in this case.[19] We do not find this to be the case. The record reflects (Tr. 681–682, 686, and 1083–1085) that all three zones contribute significantly to economies of scale on the Transco system. The system is designed to provide the capacity needed to service larger customers found throughout the system, with, in many instances, proportionately smaller facilities located downstream of the delivery points of such larger customers. (Tr. 682).[20]

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[19] We note that delivery of gas at a high load factor improves system efficiency and reduces unit costs. This fact is explained in P. Garfield and W. Lovejoy, *Public Utilities Economics* (1964) at page 186 as follows:

> . . .for a given length of pipeline, with any given load factor, the average unit transmission cost declines as the diameter of the pipeline increases. This follows from the fact that, although costs increase approximately in proportion (or a little more) with increases in diameter, the capacity increases more than proportionately; thus, for example, the capacity of a 24-inch line is about three times that of a 16-inch line.

[20] For example, if requirements of the Atlantic market were not served in zone 1, and if the requirements of the North Carolina market were not served in zone 2, but rather had those markets been added to those served in the New York City metropolitan area, more facilities, resulting in substantial additional costs, would have been needed. (Tr. 682).

THE VALUE OF DISPLACEMENT DUE TO THE STORAGE LOCATED IN ZONE 3

Zone 3 parties argue that the physical location of storage in the terminal zone benefits the entire system by displacement.[21] They point out that such storage makes possible the elimination of the physical back haul (displacement) of gas to zones 1 and 2 which would otherwise be necessary. They contend this contribution must be recognized and considered in deciding the zone rate differential issue.

Zone 1 and 2 interests note that Transco owns or has use of important storage fields in Louisiana, Mississippi and Pennsylvania. They do not dispute the fact that the zone 3 storage fields in Pennsylvania benefit the entire integrated Transco system by displacement. However, they state that while the availability of this storage service obviates the need to construct additional transmission facilities (with the capacity to move all of the peak day requirements from the supply area to the market area), the present transmission facilities do fully provide the annual capacity for all gas which must be transported from the supply areas, including the gas which will be stored after transportation from the supply areas. (Tr. 683). Zone 1 and 2 further point out that the storage service rates issue is a settled issue in this proceeding and clearly should not be used to undermine a proper allocation of transmission costs to zones. (Tr. 684).

The Commission agrees with the zones 1 and 2 position on this issue. While it is true that the storage located in zone 3 makes possible the elimination of the physical back haul (displacement) of gas to zones 1 and 2, it is also true that this transportation by displacement represents no material cost. Zone 3 admits this. (Tr. 1030). Inasmuch as the record

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[21] For example, during the winter heating season, gas from the main transmission facilities is diverted to the zone 1 and zone 2 customers. This gas is replaced downstream in zone 3 with gas from storage located in zone 3. This benefits the entire integrated Transco system. It makes unnecessary the building of additional transmission facilities which would otherwise be necessary to move all of the peak day requirements from the supply areas to the market areas.

reflects no compelling or equitable reasons to deviate from cost based rates, we reject zone 3's value of service argument.

SUMMARY OF OUR RATIONALE IN SELECTING THE MCF-MILE METHODOLOGY

We reiterate the factors we have considered in reaching our decision to allocate costs on a 100 percent Mcf-mile basis:

(1) Transco is one of the major long-line natural gas transmission systems in the country. It extends all the way from the South Texas Gulf Coast all the way to the New York City metropolitan area. (Tr. 173).

(2) The gas flows in a single direction and in a unidirectional mode (the gas does not have reversed flows). The system is not operated as a grid with gas flowing into the system at divergent points and in significant amounts. The system does not have operational characteristics which would impair the logic of giving importance to the distance factor.

(3) The system's heaviest load concentration and highest load factor are in the terminal zone. However, these two factors are not of such a magnitude as to modify our conclusion that distance of transmission is the controlling factor on a major lineal trunk transmission system like Transco.[22]

(4) The terminal zone storage benefits the entire system by displacement. However, while this displacement is very valuable to the system, there is no material cost to transportation by displacement. (Tr. 1030).

(5) The cornerstone of Commission policy on the issue of transmission cost allocation by natural gas pipelines was set forth in 1955 in *Northern Natural*, *supra*, where the Federal Power Commission stated:

> . . .it is a simple economic fact that the delivery cost of natural gas increases in close proportion to

[22]The record (Tr. 681–682, 686, and 1083–1085) reflects, as discussed above, that all three zones contribute significantly to economies of scale on the Transco system.

the length of the transmission line of any given size. Therefore, unless other circumstances are present which outweigh the importance of the length of transmission required to effect delivery, the distance factor is the prime determinant of the cost of rendering service.

The record here reflects no such circumstances which would counterbalance the distance factor.

(6) In our most recent cases[23] involving the zone rate differential issue, we have reaffirmed the basic policy of *Northern Natural*.

ADMINISTRATIVE AND GENERAL EXPENSES

A question has arisen as to whether administrative and general expenses (A&G) allocated to the transmission function should be given mileage effect. Commission precedent on this question is conflicting. In *Southern Natural*, 29 FPC 323 (1963), the FPC gave mileage effect to allocated transmission overhead costs, thus treating these costs the same as all other transmission costs. In *Northern Natural*, 14 FPC 11 (1955) and *Florida Gas Transmission Company*, 47 FPC 341 (1972), however, A&G transmission costs were not weighted by mileage.

In this proceeding the staff recommends that the A&G expenses not be given mileage effect since these costs represent only allocated portions of general overhead expenses and are not specifically mileage related. The Commission concurs with the staff's recommendation on this issue. Accordingly, in applying the Mcf-mile method of allocation, A&G expenses shall not be given any mileage effect.

EFFECTIVE DATE

The last remaining question concerns when the Commission's decision in this case should be made effective. The North Carolina Utilities Commission (North Carolina) and

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[23] *Texas Gas* (Opinion 792), *Texas Eastern* (Opinion 21), and *Great Lakes Gas Transmission Company*, Opinion No. 51, issued July 30, 1973.

the Commission staff argue that the decision should be made effective retroactively as of February 1, 1977, the effective date of Transco's rates in Docket No. RP76-136. This decision would subject Transco to potential undercollections theoretically equal to the amount of costs shifted from zones 1 and 2 to zone 3 by this decision. This amounts to approximately $15 million annually, exclusive of interest. The undercollections would result because, under the Commission's decision, Transco's proposed rates in zones 1 and 2 would be reduced while the proposed rate in zone 3 would be increased. Transco would be required to refund the overcollections to zones 1 and 2 customers, but would be unable retroactively to collect the higher zone 3 rates.

Transco, of course, urges that the Commission's decision be made effective prospectively from the date of decision so as to avoid the problem of undercollections. The North Carolina Companies recommend a third alternative, namely that the decision should be made effective as of January 1, 1978, the effective date of Transco's succeeding general rate increase in Docket No. RP77-108.

The Commission finds on the facts of this case that this order should be made effective prospectively from the date of decision. While the Commission is, of course, free to make the new rates effective as of the date the rates in this docket became effective, subject to refund after suspension,[24] in the Commission's judgement a retroactive application of this order has not been shown to be reasonable or necessary. To the contrary such action would, in the Commission's judgement based upon the circumstances of this case be arbitrary and grossly unfair. Determining refunds frequently involves the exercise of judgement and the Commission has discretion to consider pertinent facts and circumstances such as those discussed above in deciding whether refunds should be ordered in a particular case. *Placid Oil Co.* v. *F.P.C.*, 483 F.2d 880 (5th Cir. 1973). In this instance the Commission finds that refunds are unnec-

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[24] *F.P.C.* v. *Tennessee Gas Co.*, 371 U.S. 145 (1962).

essary and unwarranted. Accordingly, this order shall be effective prospectively from the date of this decision.

The Commission orders:

(A) The presiding judge's decision, issued on December 19, 1978, is reversed.

(B) Transco's zone rates shall be determined in accordance with the terms of this order.

(C) This decision shall be effective as of the date of issuance.

(D) Within 75 days from the date of this order, Transco shall file, together with supporting statements, any necessary amendments to its rate schedules in lieu of those at issue herein, in accordance with the findings and conclusions of this decision and with the Commission's Rules and Regulations.

By the Commission.

LOIS D. CASHELL,
Acting Secretary.

(S E A L)

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP76-136
and RP77-26

TRANSCONTINENTAL GAS PIPE
LINE CORPORATION (TRANSCO)

NOTICE OF DENIAL OF APPLICATIONS FOR REHEARING AND MOTIONS FOR STAY

(Issued October 4, 1979)

Applications for rehearing of Opinion No. 59, issued on August 6, 1979, were filed on September 4, 1979, by the Public Service Commission of the State of New York and on September 5, 1979, by Long Island Lighting Company, the North Carolina Companies, North Carolina Utilities Commission*, and Brooklyn Union Gas Company, *et al.* Motions for stay of Opinion No. 59 were filed by Long Island Lighting Company, the Brooklyn Union Gas Company, *et al.* and Transco.

Take notice that the Commission agreed at its meeting of September 26, 1979, to take no action on the above-mentioned applications for rehearing and motions for stay.

Accordingly, the applications for rehearing are deemed denied under section 1.34(c) of the Commission's Rules of Practice and Procedure. (18 CFR § 1.34 (c)). The motions for stay are deemed denied under section 1.12(e) of the

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*The North Carolina Utilities Commission filing also contained a rehearing petition directed at the Commission's August 30, 1979, order which dealt with the issues of rate of return and carrying charges on unrecovered demand charge credits in the above-captioned proceeding.

Commission's Rules of Practice and Procedure. (18 CFR § 1.12(e)).

By direction of the Commission.

(S E A L)

LOIS D. CASHELL,
Acting Secretary.

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP76-136 and RP77-26

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

INITIAL DECISION ON ZONE RATE DIFFERENTIALS

(December 19, 1978)

GROSSMAN, PRESIDING ADMINISTRATIVE LAW JUDGE:

Only one issue—that of appropriate zone rate differentials—remains for decision in these cases. Issues concerning cost of service, cost allocation and rate design were resolved by unanimous settlement, certified to the Commission on November 3, 1977. One provision of the settlement dealing with zone rate differentials was objected to by the New York Public Service Commission. On February 13, 1978, an Initial Decision was issued on the reserved issues of rate of return and interest on unrecovered demand charge credit balances.

By Order of April 26, 1978, the Commission remanded the opposed settlement provision for a limited hearing on the justness and reasonableness of the proffered zone rate differentials. During pre-hearing conferences on May 2 and 10, 1978, it became clear that no party was willing to attempt demonstrating that a single provision of the agreement, taken out of context, could be shown just and reasonable. A joint motion, presented at the May 10 conference, and certified to the Commission May 18, 1978, requested reconsideration of the April 26 Order and, pursuant to the terms of the settlement offer, remand of the differential issue and acceptance of the uncontested remainder. By Order of June 27, 1978, the Commission granted the motion.

Hearings on the zone rate differential issue were held and briefing was completed December 11, 1978, with the filing of Commission Staff's reply brief.[1]

The differentials now in issue had their genesis in a settlement approved by the Commission in Transco's Docket No. RP61-13 (27 FPC 187 (1962)), and imposed without redetermination since. These differentials are called the historic differentials, and their continued applicability is supported by the New York PSC, Delmarva Power and Light Company, Philadelphia Gas and Water Company, Philadelphia Gas Works, and the Zone 3 Customer Group.[2]

Opposing the continuation of the historic differentials, and favoring their replacement with differentials based on Mcf (or Dth)-mile determined differentials are the North Carolina Utilities Commission, Atlanta Gas Light Company and the North Carolina Companies.[3] Commisssion Staff advocates a Solomonic determination by basing differentials one-half on historic and one-half Mcf-miles.

Transco takes a rather neutral position, indicating its primary concern lies in opposing imposition of any change retroactively.

The Transco system, originating in the Texas and Louisiana gas supply areas, extends to the terminus through three sales rate zones. Zone 1 extends from the Louisiana-Mississippi to the Georgia-South Carolinia border; Zone 2 serves South Carolinia, North Carolina, Virginia and the District of Columbia; and Zone 3 supplies markets in Pennsylvania, New York, and New Jersey.

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[1] This brief was due to be filed December 4, 1978. Staff's motion to file out of time is granted.

[2] The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric and Gas Company, and South Jersey Gas Company, all distributor customers of Transco, and National Fuel Gas Supply Corporation, a pipeline customer of Transco.

[3] Piedmont Natural Gas Company, Inc., Public Service Company of North Carolina, Inc., and North Carolina Natural Gas Company.

The historic differentials, on a cents-per-Mcf basis, are calculated at 2.8 cents between Zones 1 and 2, and 3.6 cents between Zones 2 and 3, all at a 100 percent load factor. The proponents of redetermination, including Staff, argue that the historic differentials are not shown to be cost-based, and thus determination of cost-justified rates is necessary. The gravamen of their argument is that length-of-haul is the major cost causation factor, and that this is best measured by adoption of an Mcf-mile allocation. They claim support for this position in Opinion No. 21, *Texas Eastern Transmission Corp.*, ___ FERC ___, issued August 9, 1978, in which zone rate differentials were determined properly based on a Dth-mile method, and Staff's proposed 50–50 split between historic and Dth-mile methodologies was rejected. The effect of this Opinion, however, was stayed by Commission Order issued October 10, 1978, to permit determination on reconsideration.

It cannot be gainsaid that gas is transported by Transco farther to Zone 2 than to Zone 1, and farther to Zone 3 than to Zone 2. Zone 2 witness Clay calculated the average transportation distance to Zone 1 markets as 705 miles, to Zone 2 as 990 miles, and to Zone 3 as 1,445 miles. Mr. Clay points out that fixed zone differentials over the past 15 years have resulted in greater percentage rate increases (calculated at 100 percent load factor) to an upstream zone than to its downstream neighbor, although the actual rate increase for each has been the same.

As stated by Mr. Clay: "mileage has a direct relationship to facilities cost on the Transco system, and should clearly be reflected in the allocation of facility-related costs to zones. Due to the length of the Transco pipeline system and the continuous flow of the gas volumes (downstream), distance and volumes transported are the controlling factors in the incurrence of transmission costs on the Transco system." Together with allocating fixed transmission costs on the basis of mileage, Mr. Clay advocates allocating Administrative and General costs functionalized to transmission on the same basis.

The Zone 3 interests, while admitting to the obvious transmission distance differences, posit that other factors,

of equal or greater weight, must be considered. These, they maintain, more than offset the length-of-haul in determining zone rate differentials and support continuation of the historic differentials.

Transco witness Quinn began with a brief history of Transco operations, and noted the line originally was certificated to serve only the Zone 3 market (the terminus, then and now, of the system). Zone 3 customers' gas purchase contracts were pledged to secure the necessary financing for the line, and those customers historically have accounted for Transco's greatest sales, amounting annually to approximately 75 percent. The Zone 3 load factor, he notes, is 58.11 percent for sales and firm transportation, as compared to a 35.01 percent Zone 2 load factor. Zone 3 reliance, in much greater degree than that of Zone 2, upon storage services confers cost savings on the upstream zone, according to Mr. Quinn, because Transco can utilize a transmission facility from Atlanta, Georgia, to Downingtown, Pennsylvania, designed to meet average summer day, rather than peak winter day, demand. Additionally, he assesses the impact of *United*[4] method of cost classification and rate design.

These, he calculates, result in an experienced differential in rates between Zones 2 and 3 of 7.81 cents per Mcf.

Mr. Quinn further stated the largest portion of Transco's increased costs have occurred in gas supply, including advance payments, accounts, and most of Transco's recent construction has occurred in the gathering and supply systems and that A&G costs cannot be related, except to a very minor extent, to the length of a pipeline.

Zone 3 witness Benson generally agrees with the analysis by Mr. Quinn, but further calculates the existing differential between Zones 2 and 3 as 8.18 cents per Mcf, by including the effect of Transco's demand charge adjustment tariff provision which impacts upon high load customers. He notes that 97 percent of Transco's transmission costs

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[4] *United Gas Pipe Line Co.*, 31 FPC 1180, 50 FPC 1348.

are fixed, and of these, almost 87 percent are recovered in the commodity component of Transco's rates.

Mr. Benson argues that Transco's storage fields, located well within Zone 3, benefit the entire system, including substantial benefits to Zone 2, and their operation should result in constructive upstream movement of gas through displacement to enable peak period service to Zone 2. This storage accommodates Zone 2 summer gas purchases for winter withdrawal. Mr. Benson asserts the Transco economies of scale, made possible because of the Zone 3 load characteristics, inure equally to Zone 2 customers, and he notes that the peak day contract demands of each customer is met, notwithstanding severe curtailment. Mr. Benson concludes that the historic zone rate differentials should be maintained.

Staff witness Chinn advocates differentials based on an equal allocation of historic differentials and Mcf-miles derived costs. This, according to Mr. Chinn, recognizes the factors of load concentration, load factor, and historic development. In December 1974, in Docket No. RP75–3, Mr. Chinn testified on behalf of Commission Staff, and advocated continuation of differentials based solely on historic rates. Subsequently, he reiterated reliance on the historic allocation in docket No. RP75–75, grounded upon the effect of increasing curtailments. Here, he explained the effect of increased curtailment affected load characteristics on the Transco system, thus requiring 50 percent reliance on Mcf miles. Mr. Chinn conceded, however, that increased curtailment has resulted in increasing the concentration of Transco's gas sales in Zone 3 from 69 to 75 percent, and that the only major recent changes in Transco's transmission system were in the area of gas supply, which would justify increasing the allocation of costs to the two upstream zones.

In *Tennessee Gas Transmission Co.*, 27 FPC 202, 207 (1962), the Commission adopted the following observation:

> An argument can be made for rates based on mileage. An argument can be made for rates based on historical differentials. An argument can be made for rates

> based on a combination of mileage and historical factors. Something can be said in favor of each of such methods of allocating or rate-making. The difficulty lies in selecting the method. No one method can lay claim to being the "right" method * * * the selecting of the method of allocation to be used is bottomed on fairness and the exercise of judgment.

Here, each argument is, in fact, made. Analysis of other pipelines to determine the "answer" is of no avail, for some fall into each of the three allocation possibilities. None is sufficiently similar to Transco, in terms of the critical criteria of gas supply, distance of haul, and load factor to permit meaningful comparison. Texas Eastern perhaps is the closest operationally to Transco; however, the high load factor in Transco's terminal zone is a significant difference. Also, Transco's demand charge adjustment, which spreads demand cost among all customers, those in Zone 3 bearing the greatest proportion, is markedly different from that of Texas Eastern which apportions the adjustment within self-contained zones.

Deepening curtailment on the Transco system, the *raison d'etre* of Staff's 50–50 proposal in this case, appears to have reached its deepest point, and, as shown in Transco's Form 16 filings, demonstrates at least the beginning of an upturn in gas supplies.

Zone 2 interests rely heavily on the Commission's recent Opinion No. 21 in *Texas Eastern*, *supra*, to support adoption of Mcf-miles methodology and rejection of Staff's proposal. That Opinion is, of course, without precedential value at this point because, as noted above, it has been stayed for the purpose of reconsideration. Even were the ultimate decision the same as that expressed in Opinion No. 21, the significant differences between Texas Eastern and Transco would require individual determination with respect to each.

The arguments of Zone 3 interests concerning burden of proof are rejected. Although it is true that Transco, in seeking increased rates, has not reallocated fixed transmission costs among zones, it is seeking changes in rates. The burden is clearly upon Transco to demonstrate its rates to

be just and reasonable. This includes, by definition, the burden of showing that the manner in which the rates are applied is just and reasonable.

The evidence is persuasive that maintenance of the "historic" zone differentials, especially in light of the effects of *United* cost allocation and Transco's demand charge adjustment provision, is just and reasonable, and comports with the test of fairness expressed in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 591 (1962).

The only factor supporting adoption of Mcf-miles allocation for Transco is that of distance. The Zone 3 delivery centroid requires a transmission for a distance approximately 40 percent farther than delivery to the Zone 2 centroid. There are a myriad of factors leading to the inescapable conclusion that distance of haul is not the primary determinant of either cost causation or responsibility.

The load factor of Zone 3 is approximately 60 percent greater than that of Zone 2. This is not a recent aberration caused by curtailment. Rather, the Zone 3 load factor consistently has been significantly higher than that of Zone 2. This means Transco serves Zone 3 more efficiently than Zone 2. The increased efficiency offsets to an unquantifiable degree, and perhaps totally ameliorates the cost difference resulting from mileage. Moreover, to assess properly the true pipeline mileage through which Zone 2 gas is transported, the length of haul for storage gas and imputed back haul would have to be calculated and added proportionally, for this would represent the constructive mileage for the total gas delivered to Zone 2.

The effect of the *United* allocation suggests strongly that Zone 3 customers now are bearing the responsibility for a disproportionate share of system fixed transmission costs, to the benefit of Zone 2 customers. Compounding this result is the demand charge adjustment, weighted heavily against high load factor customers.

These costs added to the historic differentials appear clearly to represent the maximum responsibility of Zone 3 customers. In fact, a better case could be made for zone elimination than for Mcf-miles allocation, since 87 percent

of fixed transmission costs now are allocated volumetrically.

This decision makes unnecessary any determination of whether A&G costs are susceptible of allocation on the basis of mileage, although it is clear that the evidence supporting that approach is far from persuasive.

ULTIMATE FINDING AND CONCLUSION

Upon consideration of the record in this proceeding, including the briefs filed, it is concluded that the zone rate differentials filed as a component of Transco's rate increase application, are just, reasonable, non-preferential and nondiscriminatory, and should be continued in effect.

Wherefore, it is ORDERED, subject to the Commission's Rules of Practice and Procedure, that the schedule of rates filed by Transcontinental Gas Pipe Line Corporation herein, to the extent it imposes differential rates for service to zones, is approved, to take effect on the effective date of the rate filing.

/s/

STEPHEN L. GROSSMAN
Presiding Administrative Law Judge

APPENDIX I

1. Section 4 of the Natural Gas Act, 15 U.S.C. 717c, provides:

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into ef-

fect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a

rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

2. Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Nos. 80-1937, 80-1938, 80-1939

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CLERK

IN THE

Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Questions Presented

The questions presented by the petitions for a writ of certiorari are:

1. Whether the Court of Appeals for the District of Columbia Circuit's holding that the Commission must observe the requirements of § 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), when imposing a new rate structure of its own making, presents any important and novel question warranting review by this Court.

2. Whether the fact that a pipeline's long-standing rate structure originated from a settlement relieved the Commission of the duty to comply with § 5(a) before changing the constant elements of the rates by imposing a new rate structure of its own making.

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IN THE

Supreme Court of the United States

October Term, 1980

Nos. 80-1937, 80-1938, 80-1939

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CUSTOMER RESPONDENTS IN OPPOSITION

Respondents The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, National Fuel Gas Supply Corporation, Philadelphia Electric Company, Philadelphia Gas Works, Public Service Electric and Gas Company, and South Jersey Gas Company (the Zone 3 Customer Group)[1] file this brief in opposition to the petitions for a writ of certiorari

1. The list required by Rule 28.1 of the rules of this Court appears at Appendix A to this brief.

submitted on behalf of the Federal Energy Regulatory Commission (FERC or Commission) (No. 80-1937), the North Carolina Utilities Commission (NCUC) (No. 80-1938), and North Carolina Natural Gas Corporation, *et al.* (NC Cos.) (No. 80-1939).

Opinions Below

The Zone 3 Customer Group adopts the description of the opinions below contained in FERC's Petition at 1. The opinion of the court of appeals is reported at 642 F.2d 1335.

Jurisdiction

The Zone 3 Customer Group adopts the statement of jurisdiction contained in FERC's Petition at 1-2. By letter of July 16, 1981, the Clerk of this Court extended the time for filing responses to petitions for a writ of certiorari to and including July 31, 1981.

Statutes Involved

The Zone 3 Customer Group adopts the statement as to statutes involved contained in FERC's Petition at 2.

Statement of the Case

The petitions filed by FERC, NCUC, and NC Cos. seek review of the portion of the decision of the court of appeals that set aside a FERC opinion and order imposing a mileage formula reflecting only distance of haul for alloca-

tion of fixed transmission costs among sales zones on the natural gas pipeline system of Transcontinental Gas Pipe Line Corporation (Transco).[2] Transco has filed a cross-petition (No. 80-2143) seeking review of the portion of the court's decision that affirmed FERC's determination of the lawful return on equity capital for that pipeline.

These cases arise from a general systemwide rate increase filing made by Transco on July 30, 1976. In its filing, Transco reflected increases in a number of the components of its overall cost of service, including an increased rate of return on common equity. However, the filing proposed no change in the zone rate differentials,[3] which had formed a prominent part of Transco's rate structure since 1962.[4] The unmodified zone rate differentials neither

2. Transco's system has three sales zones. Zone 1 includes Mississippi, Alabama and Georgia; zone 2 includes South Carolina, North Carolina, Virginia and the District of Columbia; zone 3 includes Maryland, Pennsylvania, New Jersey, Delaware and New York.

3. The zone rate differentials govern the assessment of fixed transmission costs among sales zones. The historical rate differentials, at 100% load factor, are 3.6 cents per Dekatherm (Dth) between zones 3 and 2, and 2.8 cents per Dth between zones 2 and 1. FERC used Dth and Mcf (thousand cubic feet) interchangeably in its opinion. FERC Pet., App. F at 38a n.7. Load factor is the percentage relationship between average daily receipts of gas and total contract demands.

4. This basic rate structure, and the zoned rates which comprised its essential component, found their genesis in a 1962 rate case settlement. *Transcontinental Gas Pipe Line Corp.*, 27 F.P.C. 187 (1962). The zone rate differentials were employed continuously thereafter for cost allocation and rate design in all rate increase and rate reduction filings made by Transco. Prior to Transco's July 30, 1976 filing, no party challenged or even questioned the zone rate differentials, which had been continually incorporated in every Transco rate settlement, and formed a prominent feature of Transco's lawful rates, which were found "just and reasonable" on many occasions. Commission orders on Transco rate settlements and filings may be found at: Docket No.

(footnote continued on next page)

caused nor contributed to Transco's requirement for increased rates.

After suspension, Transco's increased rates became effective, subject to refund, on February 1, 1977. A settlement that resolved many of the issues presented by Transco's filing was approved by FERC order issued July 27, 1978, which order set the zone differential question for hearings and decision.[5]

After hearings, the Presiding Administrative Law Judge (ALJ) issued an initial decision, thoroughly analyzing the evidence of record, and finding and concluding that:

> Upon consideration of the record in this proceeding, including the briefs filed, it is concluded that the zone rate differentials filed as a component of Transco's rate increase application, are just, reasonable, nonpreferential and non-discriminatory, and should be continued in effect.[6]

RP75-75, 8 Matthew Bender, Federal Power Service (FPS) 5-355 (1976); 54 F.P.C. 2150 (1975); 51 F.P.C. 1243 (1974); 46 F.P.C. 1411 (1971) (rates found "just and reasonable." *Id.* at 1413); 44 F.P.C. 1737 (1970) (no party raised issues "on matters of rate design"; rates found "just and reasonable." *Id.* at 1739); 42 F.P.C. 1279 (1969) (The Commission noted that no party, including the Staff, had raised issues "on matters of rate design," and specifically found that "the rates proposed by Transco are just and reasonable." *Id.* at 1281-82); 36 F.P.C. 431 (1966); 31 F.P.C. 1150 (1964).

5. The return on equity issue was addressed in a separate hearing. Transco Pet. at 4-5. While the Zone 3 Customer Group takes no position as to the proper rate of return for Transco, we believe the decision below on the rate of return issue is not inconsistent with the court's resolution of the zone differential issue, as to which Transco is in the position of a stakeholder. *See infra,* at 10 n.11.

6. FERC Pet., App. H at 62a. The ALJ considered and gave effect to each of the major cost-causing factors which the Commission had previously determined relevant to a proper allocation of trans-

(footnote continued on next page)

The ALJ also stated:

> In fact, a better case could be made for zone elimination than for Mcf-miles allocation, since 87 percent of fixed transmission costs are now allocated volumetrically.[7]

By its Opinion 59, FERC reversed the ALJ's decision, and without finding that Transco's unchanged zone rate differentials were unlawful or addressing the contrary findings of the ALJ,[8] ordered that transmission costs be prospectively allocated among rate zones by a strict Mcf-mile formula which gave exclusive weight to distance of haul only. The effect of this order was to increase the zone rate differential between Transco's sales zones 2 and 3 by more than 300%, and to impose virtually the entire rate increase allowed Transco on its zone 3 customers alone. FERC Pet., App. F at 41a.

Several parties sought rehearing, citing the material defects in FERC's decision. FERC, without discussion of the matters raised by the parties, issued a short "notice"

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mission costs among customers of an interstate pipeline: load distribution and relative size of markets, load factors, and distance of haul. *See Northern Natural Gas Co.*, 14 F.P.C. 11, 20-22 (1955), *aff'd sub nom. Interstate Power Co.* v. *FPC*, 236 F.2d 372 (8th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957). He also recognized that the location of storage on Transco's system would preclude use of a strict mileage formula for allocation of costs, and that other elements of Transco's rate structure militated strongly against any increase in Transco's zone rate differentials. FERC Pet., App. H at 60a-61a.

7. FERC Pet., App. H at 61a-62a.

8. An agency's departure from the ALJ's findings is vulnerable if it fails to reflect "attentive consideration" to the ALJ's decision. *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1121 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

stating that applications for rehearing, and related requests for a stay, were "deemed denied." FERC Pet., App. G at 53a-54a.

The court of appeals issued a partial stay of Opinion 59, pending review at the request of the Zone 3 Customer Group and others.[9]

On review, the court held that FERC had exceeded its statutory authority in imposing the change in the zone rate differentials, reasoning that "[i]f the Commission seeks to make such changes, it has no alternative save compliance with the strictures of section 5(a)." FERC Pet., App. C at 33a. The court made it clear that FERC's failure to observe its statutory mandate was not harmless error, because FERC's non-compliance with § 5(a) "denies 'Transco's existing zone differentials the substantive consideration they deserved.'" FERC Pet., App. A at 12a.

The court also held that, even if FERC had observed its statutory mandate, major elements of its opinion were not supported by substantial evidence. FERC makes no claim that the court below erred in this respect.[10] This aspect

9. The court's order of December 11, 1979 allowed the higher rates mandated by Opinion 59 to Transco's sales zone 3 to become effective, and maintained the *status quo* as to sales zones 1 and 2. The increased charges to zone 3 customers have been held in escrow by Transco pursuant to the stay order, and will be made available to adversely affected consumers in sales zone 3 under the court's opinion.

10. Specifically, the court observed FERC's disregard, without reasoned analysis, of several factors justifying the existing rate structure, including *relative* economies of scale attributable to the 75% load concentration in sales zone 3, costs avoided through zone 3 storage operations, and evidence demonstrating that the existing rate structure was a more accurate reflection of cost incurrence. Moreover, the evidence of material defects in the mileage formula, *as applied to Transco,* had been ignored by FERC. Consequently, the court concluded that "the evidence of record supporting [FERC's] prescription falls short of substantiality." FERC Pet., App. A at 19a-21a.

of the court's opinion alone provides ample basis for the decision below.

FERC and others sought rehearing and rehearing *en banc* of the court's decision. No judge of the court of appeals requested a vote on the suggestions for rehearing *en banc*; accordingly, they were denied. Although the petitions for rehearing were also denied, the court amended its opinion to address a concern raised by FERC as to the scope of that opinion. FERC Pet., Apps. C, D, and E at 32a-35a.

Reasons for Denying Writ

The decision below is a proper application of this Court's long-established interpretation of the Commission's limited rate-review functions under § 5(a) of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). As such, it presents no question warranting review.

Following this Court's precedents, the court of appeals held that the Commission had exceeded its statutory authority in ordering a change in the zone rate differentials in a pipeline's tariff—which the pipeline had not proposed to change—without first finding them unlawful. The court below also found that, regardless of FERC's failure to observe the standards of § 5(a), the essential elements of its order were not supported by substantial evidence. Application of these criteria for judicial review "is primarily the task of the courts of appeals." *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-792 (1968).

Contrary to FERC's stated apprehensions, settlements have not been discouraged by the decision of the court below. But even if this were the case, settlement procedures are properly shaped by a correct application of the law.

I.

This case presents no novel or important question of law.

1. The court of appeals held that the Commission may not itself change zone rate differentials, which the pipeline has not proposed to change, without first finding them unlawful. This is entirely consistent with this Court's holding in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956):

> The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to the basic power, *in the case of a newly changed rate or contract* . . . , the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its

> order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remained the same—*to determine whether the rate fixed by the natural gas company is lawful.* (Emphasis added)

No party contends that the new zone rate differentials imposed by FERC's decision were "made in the first instance" by a natural gas company. The pipeline made no such proposal in its rate filing. Therefore, the procedures contemplated by § 5(a) of the Natural Gas Act had to be followed by the Commission before it could lawfully effect a change in these unchanged features of the rate.

There are several reasons why the courts have found it necessary to distinguish between "changed" and "unchanged" rates and rate structures. The "unchanged" rate is the filed rate. It has the effect of law. *See Arkansas Louisiana Gas Co.* v. *Hall,* 49 U.S.L.W. 4947 (July 2, 1981). It cannot be changed retroactively by the pipeline or the Commission. This legal framework assures the customers certainty and stability of rates and rate structures.

The pipeline may change a rate or rate structure prospectively, but only if it follows the filing procedures of § 4 of the Natural Gas Act, 15 U.S.C. § 717c. *Mobile,* 350 U.S. at 342. The Commission may allow the changed rates to become effective under § 4(e) without suspension, in which case they become the lawful rates. Or the Commission may suspend the rate change, thereby making the *increased rate* subject to refund if found not justified. The "Commission is empowered [under § 4(e)] to require the company to collect *the increment* under bond and account-

ing, and refund it if it could not make out its case *for the increase.*" *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23 (1968) (emphasis added).[11]

This Court and lower courts have, on many occasions, recognized the distinction between § 4 and § 5 in the context of proposals to change the allocation provisions of pipeline tariffs. In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 643-645 (1972), this Court held that enforcement of the anti-discrimination provisions of § 4(b), as to tariffs already effective and on file, required the Commission to proceed under § 5(a) to modify the pipeline's allocation practices. *Id.* at 643. Subsequently, in *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 940-941 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974), the court of appeals stated specifically that the exercise of the Commission's authority under § 5(a) "is a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz.*: the ille-

11. (Quoting from *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 146 (1960)). These decisions confirm the *Mobile* holding that the Commission's "supplementary" § 4(e) powers extend only to *changes* in "rates" or "classifications", and may not be used to modify retroactively that which the pipeline "in the first instance" has not proposed to change. The court of appeals' decision was entirely consistent with these principles—finding the burden was properly on Transco to justify its proposed *increased* rate of return, under § 4(e), and that FERC had the burden of demonstrating, under § 5(a), that the pipeline's *unchanged* zone rate differentials, which "were no part of [the pipeline's] argument for higher rates" (FERC Pet., App. A at 15a), were unlawful before instituting a change in the long-standing rate structure.

gality of an existing condition and the justness and reasonableness of the remedy."[12]

Where the Commission seeks to modify a pipeline's existing rate structure, the distinction between § 4 and § 5 has been consistently and uniformly recognized. In affirming a Commission order requiring revisions in a pipeline's tariff reflecting the allocation of transmission costs among its customers, the Court of Appeals for the Eighth Circuit explained that:

> [T]he Commission was obliged to recognize and permit [the pipeline's existing rate structure] unless and until it was proved by substantial evidence that [it was] unduly discriminatory.[13]

In its underlying *Northern* decision, the Commission had made it clear that "the initial question to be decided is not whether any of the zoning proposals are feasible, but, rather, *whether the present rate structure of Northern is*

12. *Accord, Sebring Utilities Comm'n* v. *FERC*, 591 F.2d 1003, 1013 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979); City of *Willcox* v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826, 832 (5th Cir. 1977); *Louisiana* v. *FPC*, 503 F.2d 844, 861 (5th Cir. 1974). FERC attempts to bypass these decisions by characterizing them as "curtailment cases." FERC Pet. at 13 n.6. There is no distinction, concerning the issue presented here, between curtailment cases and rate cases. The former involve tariffs governing the allocation of gas; the latter involve tariffs governing the allocation of costs. The statutory standards applicable to each allocation practice are the same. The fact that the curtailment cases arise out of the Commission's *transportation* jurisdiction under section 1(b) of the Act, 15 U.S.C. § 717(b), does not alter this result. *See FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 636, 642-45.

13. *Interstate Power Co.* v. *FPC*, 236 F.2d 372, 387 (8th Cir. 1956), *aff'g Northern Natural Gas Co.*, 14 F.P.C. 11 (1955), *cert. denied*, 352 U.S. 967 (1957).

unduly discriminatory or preferential." 14 F.P.C. at 18 (emphasis added). Contrary to FERC's representations to this Court (Pet. at 13-14), in every case involving proposals to change a pipeline's existing rate structure or allocation practices where the § 4-§ 5 issue has been squarely presented, the Commission has consistently applied § 5, not § 4.[14]

FERC argues (Pet. at 7) that, under the language of § 4(e) of the Natural Gas Act, the pipeline bears the burden of proof on "every aspect" of its new rates when it files under § 4(d). But that is not what the statute says. Section 4(e) provides in pertinent part: "At any hearing involving a rate or charge sought to be *increased*, the burden of proof to show that the *increased* rate or charge is just and reasonable shall be upon the natural gas company . . . ." (Emphasis added) The language of the statute makes it clear that it is only under § 5(a) that FERC is

14. *See, e.g., Hydrocarbon Transfers, Inc.*, Docket No. ST79-13-000, Order Denying Request for Hearing and Condition (Apr. 10, 1981) (Proceeding involving proposed new allocation of cost of high-priced gas supplies "is pursuant to Section 5 of the Natural Gas Act and can only have prospective application." *Mimeo* at 1); *United Gas Pipe Line Co.*, Docket No. RP78-68, Order Denying Rehearing (Aug. 8, 1980) (Commission rejected "claim that the Commission erred in ordering a hearing under section 5 only, rather than under both sections 4 and 5, and in concluding that any allocation change should be prospective only." *Mimeo* at 2), *petition for review pending sub nom. United Gas Pipe Line Co.* v. *FERC*, No. 80-1850 (5th Cir.); *United Gas Pipe Line Co.*, Docket No. RP72-133, 18 FPS 5-279 (July 18, 1979) (Commission found pipeline's method of allocating emergency gas costs "unjust, unreasonable, unduly discriminatory, and preferential, in violation of section 5 . . . ." *Id.* at 5-279. Commission recognized that relief could be prospective only. *Id.* at 5-280), *aff'd sub nom. United Gas Pipe Line Co.* v. *FERC*, No. 79-3209 (5th Cir. July 6, 1981); *Michigan Wisconsin Pipe Line Co.*, 34 F.P.C. 621, 624, 627 (1965); *Id.* at 634-35, 655 (initial decision).

empowered to modify unchanged elements of the pipeline's rate structure. Section 5(a) provides in pertinent part that, upon a finding that

> any rate, charge, or classification . . . , rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, or unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be *thereafter observed and in force*, and shall fix the same by order . . . . (Emphasis added)

Thus, the court below was simply applying existing law when it held:

> The Commission contends that it need not observe section 5(a) procedures because this case was commenced by Transco's filing for higher rates under section 4(e), which places the burden of proof upon the petitioner. But section 4(e) places upon the petitioner the burden of justifying its higher rates only when the petitioner has proposed an increase in rates. Therefore, we agree that Transco had the burden of proof on the rate of return question, but we cannot accept the proposition that because a company files for higher rates, it bears the burden of proof on those portions of its filing that represent no departure from the status quo.[15]

The unchanged zone rate differentials employed by Transco represented no departure from the *status quo*, for they had been reflected continuously in the pipeline's rates for some fourteen years prior to its filing.

2. Reliance by FERC (Pet. at 9) on this Court's *Ayrshire* decision,[16] to advance its view that the Natural

15. FERC Pet., App. A at 15a.

16. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949).

Gas Act does not recognize the changed-unchanged dichotomy, is simply misplaced. FERC cites an excerpt from that decision which it claims is in support of its position. But a more complete quotation from this Court's opinion in *Ayrshire*[17] makes it clear that the legislation administered by the Interstate Commerce Commission *did* recognize a procedural distinction between cases in which the Commission was faced with rate changes proposed by a carrier and circumstances where the agency desired to change a rate which the carrier did not propose to change. This is entirely consistent with the decision below.

FERC's claim (Pet. at 12) that the decision below is inconsistent with this Court's holding in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) is equally misplaced. In the instant case, the pipeline proposed no change in its long-standing method of cost allocation, while in *Tennessee* the pipeline had filed a change in the method of cost allocation among its sales zones.[18] Moreover, in con-

17. "It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under § 15(1) to deal with rate schedules already effective supports that view. *For once the Commission finds the rate to be unjust or unreasonable or unjustly discriminatory or unduly prejudicial or otherwise unlawful, the Commission is granted the power under § 15(1) to determine and prescribe the just and reasonable rate.*" 335 U.S. at 582-83 (emphasis added). This omission alone, accomplished via ellipsis in FERC's petition, highlights the bankruptcy of FERC's belated "Interstate Commerce Commission" argument, which appeared for the first time in its petition to this Court. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 37 (1976).

18. As the underlying decision makes clear, Tennessee had departed from the historical rate relationships by giving 50% weight to a new Mcf-mile allocation in the rate filing at issue. *Tennessee Gas Transmission Co.*, 27 F.P.C. 202, 230 (1962) (initial decision).

(footnote continued on next page)

trast to Transco's long-standing rate structure, Tennessee's rates did not reflect settled practice, and had never been approved, decided or agreed to,[19] a fact explicitly recognized by this Court (*Id.* at 147-148):

> [Tennessee] has since the early 1950's, with Commission approval, divided its extensive pipeline system into six rate zones with rate differentials. *The appropriate allocations of its costs of service among these zones and types of customers was not decided by the Commission nor agreed upon between the parties, but was left for future decision. It was in this posture that in 1959 Tennessee Gas, pursuant to section 4(d) of the Natural Gas Act, filed with the Commission proposed increased rates for its six rate zones.* (Emphasis added, citations omitted)

This Court, therefore, properly found that the pipeline had the burden of supporting its own new method of cost allocation in a § 4 filing. *Id.* at 152. The decision below is in no way inconsistent with that view.

FERC cites other cases (Pet. at 13 n.7 and at 14 n.8) in support of its contention that it has consistently interpreted its § 4(e) authority to apply to "each and every element" of a pipeline's rates.[20] These cases are thor-

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Moreover, as the Commission explained in deciding the rate structure issues, the allocation method approved would be applicable "for the future," and it was "immaterial whether the applicant, Tennessee, had sustained its alleged burden of proof on the issue as originally presented." 27 F.P.C. at 206. Undoubtedly, it was for this reason that the § 4-§ 5 issue was never squarely presented in the *Tennessee* case.

19. *See* the underlying decision in *Tennessee Gas Transmission Co.* v. *FPC*, 293 F.2d 761, 763 (5th Cir. 1973).

20. FERC Pet. at 13. The basic premise of this argument is incorrect. *See supra*, at 11-12 and at 12 n.14.

oughly unpersuasive as a decisional guide for resolution of the issue before this Court. In virtually every case cited, the § 4-§ 5 issue was neither raised nor discussed by the Commission. In the only two cases where the § 4-§ 5 issues was addressed, and considered on judicial review, the reviewing courts reached decisions consistent with that of the court below.[21]

3. Aside from FERC's failure to follow the statutory procedures of § 5(a), the court below found that FERC's order was not supported by substantial evidence. Specifically, the court determined that FERC: (1) provided no reasoned explanation for its departure from Transco's long-standing allocation practice (FERC Pet., App. A at 17a-18a); (2) ignored entirely, or dismissed without ade-

21. In *Kansas-Nebraska Natural Gas Co.* v. *FPC*, 534 F.2d 227 (10th Cir. 1976), on facts virtually identical to those in *Tennessee*, the court affirmed a Commission order under § 4(e) which subjected a pipeline to refunds resulting in "undercollections". As with *Tennessee*, however, the pipeline's filing under § 4 proposed a *new* cost allocation methodology, thus representing a "departure from the status quo," and triggering the application of § 4(e) to the changed allocation method. *See Kansas-Nebraska Natural Gas Co.*, 53 F.P.C. 1691, 1727-1728 (1975).

In *Texas Gas Transmission Corp.* v. *FERC*, No. 79-1385 (D.C. Cir. Feb. 13, 1981), the court, consistent with the decision in the instant case, reversed a Commission order which modified, without the requisite § 5(a) findings, the production cost allocation methodology which was utilized in the pipeline's § 4 filing and *which represented no departure from the methodology previously employed.*

In *Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578 (D.C. Cir. 1979), neither the court nor the Commission discussed the applicability of § 5(a). However, the court reversed a Commission opinion ordering a departure from a long-standing costing methodology, as unsupported by substantial evidence. The court below relied on *Columbia* in holding that the Commission had failed to marshal substantial evidence to support its decision, regardless of whether it observed the standards of § 5. FERC Pet., App. A at 17a-21a.

quate explanation, cost evidence supporting the existing rate structure (FERC Pet., App. A at 18a-20a); and (3) provided no basis for its refusal to address the substantial evidence of material defects in the mileage formula it imposed (FERC Pet., App. A at 20a).[22] The court's conclusion that essential elements of FERC's "prescription" were not supported by substantial evidence (FERC Pet., App. A at 21a) provides a valid independent ground for denying the petitions.[23]

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22. NC Cos. alone contend (Pet. at 27) that the court's review of the record was selective. This claim is in direct conflict with the court's detailed discussion of the competing contentions of the parties respecting the factual matters at issue. *See* FERC Pet., App. A at 17a-20a. Such a review of the evidence is a function particularly suited to the court of appeals and does not warrant the intervention of this Court. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

23. FERC raises no issue as to the specific relief granted by the court below. NC Cos.' reliance (Pet. at 26) on *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952) is misplaced. In contrast to the facts in *Idaho Power*, the FERC order here was unsupported by substantial evidence. Accordingly, that order could not be reinstituted even if FERC's "error of law" were subsequently remedied by the requisite statutory findings. A remand therefore would be a purely idle and useless formality, entailing unnecessary delays in returning to consumers the monies held in escrow pursuant to the court's stay order. NCUC's citation (Pet. at 9) of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978) is similarly misplaced. In *Vermont Yankee*, this Court found that the reviewing court had improperly imposed *its own notion* of proper procedural requirements where the procedures being followed by the agency in a rulemaking fully met the standards set by Congress. In the instant adjudicatory case, the procedures of § 5(a) were prescribed *by Congress*, not the courts, and, in the words of the court below: "If the Commission seeks to make such changes, it has no alternative save compliance with strictures of section 5(a)." FERC Pet., App. C at 33a.

II.

The fact that the long-standing zone rate differentials had their genesis in settlement does not alter the Commission's statutory responsibilities.

The Commission approved Transco's zone rate differentials by a series of orders going back to 1962. In several instances, the matter was brought before the Commission in settlements designed, upon approval, to terminate litigation arising from a rate filing by the pipeline. The settlements contained disclaimers to the effect that adherence thereto would not be construed as support for any particular principle of rate-making or rate design.[24]

FERC contends (Pet. at 16) that the court of appeals treated the 1962 settlement which initially reflected Transco's existing zone rate structure "as having the force and effect of precedent." Aside from the fact that the court below made no such finding, the mere fact that the unmodified rate structure came into being initially via settlement[25] does not relieve FERC of its responsibility to

24. In each instance, the Commission approved the rates and, in so doing, gave its stamp of approval to the zone rate differentials reflected in the published rates. This was approval of a zone rate differential, not a mere "numerical relationship" deriving its sole vitality from a rate settlement, as the Commission (Pet. at 16) suggests. It is the end result of the Commission's action which determines its legality. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The Commission was not faced in those earlier cases with the need to approve a cost allocation or rate design principle not apparent in the published rate.

25. Rates and rate structures may find their genesis in initial rates authorized under § 7 of the Natural Gas Act, 15 U.S.C. § 717f, rates reflected in approved settlements, increased or reduced rates filed under § 4 and made effective without suspension or litigation, or rates promulgated after hearings under § 4 or § 5 (either with or without controverted rate structure issues).

act under § 5(a) if it seeks to impose a new rate structure of its own making. The court of appeals gave Transco's long-standing rate differentials no more or less "precedential effect" than would be given those of any other regulated company which sought no change in its existing rate relationships.[26]

III.

Rate settlements before the Commission are not adversely affected by the decision below.

The Natural Gas Act does not address settlements; they obtain no legal status from that statute. Settlement procedures have developed over the years as a device to overcome the delays inherent in Commission proceedings by placing before the Commission an agreement which contains results that do not offend the standards of the Act.

The proposition that settlements contribute to administrative efficiency (FERC Pet. at 17-18) is a truism. The supposition that the decision below will "likely deter settlement" and "have the effect of encouraging full-scale

26. The only "precedential effect" accorded such rate structures is that, if FERC seeks to impose its own rates, it must find the existing rate structure unlawful. This does not diminish the value of the settlement disclaimer. The parties to the settlement and the Commission remain free to challenge the zone rate structure in a subsquent rate proceeding. Nonetheless, and aside from the provisions of the Natural Gas Act, it is well established that a party which seeks to change a current practice bears the burden of proof to support the new practice which it advocates. *See* Administrative Procedure Act § 7(d), 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *Environmental Defense Fund* v. *E.P.A.*, 548 F.2d 998, 1012-1015 (D.C. Cir. 1976) (supp. op. on reh'g), *cert. denied*, 431 U.S. 925 (1977).

adjudication of all rate issues" (*Id.* at 18) is not factually supported by FERC.

In sharp contrast to this speculation, a more accurate assessment of the impact of the decision below on the settlement process was presented by FERC on brief to the court of appeals. In support of its own decision *against* retroactive changes in Transco's rate structure (*see* FERC Pet., App. F at 50a-52a), FERC explained:

> In addition, a requirement of retroactivity could deter settlements on fundamental rate issues. Rather than risk retroactive liability—by FERC plugging new rate designs into a framework otherwise settled some time ago—a pipeline might well refuse to agree on anything, and continue to contest all issues. FERC Brief at 58.

The decision below is in full accord with both these practicalities of the settlement process and the routine practice of party litigants of providing *by settlement* that rate structures may be modified prospectively only—*a practice consistent with § 5(a) and designed to facilitate settlements and prompt refunds.*[27]

27. *See, e.g., Great Lakes Gas Transmission Co.*, Docket No. RP79-10, Order on Stipulation (Mar. 31, 1980) ("Any change in cost allocation or rate design methodology shall be effective prospectively . . . ." *Mimeo* at 2); *El Paso Natural Gas Co.*, Docket No. RP76-59 (Rate Design), Order Approving Settlement (June 2, 1977) ("any party other than El Paso shall have the right, in any El Paso general rate increase proceeding subsequent to RP77-18 or in any proceeding initiated under Section 5 of the Natural Gas Act to raise a rate design issue; provided, however, that any Commission decision in any such proceeding shall not become effective prior to January 1, 1980, or the date of the Commission's order, whichever is later." *Mimeo* at 2); *Consolidated Gas Supply Corp.*, Docket No. RP73-107, Op. No. 819, 13 FPS 5-561 (Aug. 12, 1977) ("the settlement provided for . . . prospective determination of the reserved issues,"

(footnote continued on next page)

Actual experience shows that FERC's apprehension concerning potential adverse impacts on settlements is unfounded. The decision below was issued on September 24, 1980; the *Columbia* decision,[28] which similarly required a reasoned explanation for any departure from a settled cost allocation practice, was issued on May 17, 1979. Any resultant adverse impacts on the flow of settlements to the Commission should long since have become evident. Yet, as shown by Appendix B to this brief, the number of settlements submitted to the Commission in the past year has *increased* by some 28%.[29]

FERC's "settlement impact" claim is without substance, and presents no question warranting this Court's attention.

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mimeo at 1); *Great Lakes Gas Transmission Co.*, Docket No. RP75-94, Order Approving Settlement (Aug. 31, 1976) ("the rate design issue is reserved for further proceedings, the resolution thereof to become effective prospectively only," *mimeo* at 2); *Trunkline Gas Co.*, 54 F.P.C. 138, 139 (1975); *Texas Gas Transmission Corp.*, 54 F.P.C. 1501, 1502 (1975); *Texas Eastern Transmission Corp.*, 54 F.P.C. 2174, 2175 (1975); *Natural Gas Pipe Line Co. of America*, 52 F.P.C. 652, 656 (1974).

28. *Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578 (D.C. Cir. 1979).

29. Manifestly, a clear-cut and correct statement of the law constitutes an inducement to settlements by reducing the areas of dispute. The decision below is clear and consistent with established precedent and practice. FERC would introduce doubt and confusion. That cannot be conducive to sound regulatory policy or efficient administrative process. *Cf.* FERC Pet. at 11.

Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE BROOKLYN UNION GAS COMPANY
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
ELIZABETHTOWN GAS COMPANY
NATIONAL FUEL GAS SUPPLY CORPORATION
PHILADELPHIA ELECTRIC COMPANY
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
SOUTH JERSEY GAS COMPANY

By: JOSEPH P. STEVENS

Joseph P. Stevens

July, 1981

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APPENDICES

APPENDIX A

Listing Pursuant to Rule 28.1

In accordance with Rule 28.1, Respondents The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, National Fuel Gas Supply Corporation, Philadelphia Electric Company, Philadelphia Gas Works, Public Service Electric and Gas Company, and South Jersey Gas Company, state that they have the following parent, subsidiary, and affiliated corporations:

The Brooklyn Union Gas Company has subsidiaries Honeoye Storage Corporation, Boundary Gas Corp., and affiliate Fuel Resources Gathering Inc.

Consolidated Edison Company of New York, Inc. has subsidiaries Honeoye Storage Corporation and Boundary Gas Corp.

Elizabethtown Gas Company is a subsidiary of National Utilities and Industries Corp. and has affiliates Utility Propane Co., National Gas Gathering Co., National Energy Leasing Co., National Exploration Co., National Enerdrill Corp., and Lenape Resources Corp.

National Fuel Gas Supply Corporation is a subsidiary of National Fuel Gas Supply Company and has affiliates National Fuel Gas Distribution Corp. and Seneca Resources Corp.

Philadelphia Electric Company has affiliates Adwin Equipment Co., Adwin Realty Co., and The Susquehanna Power Co.

South Jersey Gas Company is a subsidiary of South Jersey Industries, Inc., and has affiliates South Jersey Energy Co., Energy and Minerals, Inc., Jesse T. Morie & Son, Inc., Delaware Valley Industrial Gases, Inc., South Jersey Fuels, Inc., and South Jersey Exploration Co.

APPENDIX B

FERC Response to Information Request

[LETTERHEAD OF]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

June 25, 1981

Mr. Gary E. Guy
Cullen and Dykman
1019 Nineteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Guy:

In response to your question on the number of settlements filed with the Commission, our records begin on June 15, 1979, the effective date of the order instituting the new settlement procedures.

From that date through June 14, 1980, 140 settlements were filed. From June 15, 1980 through June 14, 1981, 179 settlements were filed.

Very truly yours,

/s/ LOIS D. CASHELL
Lois D. Cashell
Assistant Secretary

Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1937, 1938, 1939

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT LONG ISLAND LIGHTING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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July 31, 1981

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Natural Gas Act, 15 U.S.C. 717, *et seq.*

Section 4, 15 U.S.C. 717c 2, 6

Section 5, 15 U.S.C. 717d 1, 5, 6, 7

Long Island Lighting Company (LILCO)* hereby responds to the petitions for writs of certiorari submitted on behalf of the Federal Energy Regulatory Commission (No. 80-1937), and by North Carolina Utilities Commission (No. 80-1938) and North Carolina Natural Gas Corporation, *et al.* (No. 80-1939) [hereinafter referred to as "Petitioners"].

REASONS FOR DENYING THE PETITION

1. The Petitioners for a writ of certiorari claim that the decision of the court below raises an important question insofar as it holds that the Commission can change a settled method of designing rates only if it complies with the requirements of Section 5 of the Natural Gas Act. They claim that complying with the requirements of Section 5 will severely limit the Commission's power to eliminate discrimination. We disagree. We do not believe it will have any significant impact on how the Commission conducts its affairs.

The only effect of the decision is to require the Commission to make a finding based on substantial evidence in the record that the existing method of designing rates is unjust and unreasonable. That requirement will not prevent the Commission from eliminating discrimination. If an existing method of designing rates in fact results in discriminatory rates, then the parties that are being discriminated against or the Commission, through its staff, should be able to present the evidence that would support such a determination.

Moreover, it would seem that evidence sufficient to support a determination that the new method that the Commission wishes to implement is just and reasonable would also be sufficient to also

*LILCO has subsidiaries (other than wholly-owned subsidiaries) Honeoye Storage Corporation and Boundary Gas, Inc.

support a determination that the existing method is not just and reasonable. As we see it, the additional burden placed on the Commission by the decision below is simply to declare what would otherwise be implied but often goes unsaid. And if the decision prevents the Commission from doing what it believes is appropriate, it is simply because the Commission may find it difficult to declare that an existing method of designing rates for some reason or another now produces an unlawful result even though that method has been settled practice on the pipeline for several years and has been accepted by the Commission as an essential element in settlement of numerous rate cases. Understandably, the Commission would rather not have to make such a declaration; and perhaps in some such cases, it may hesitate to do so and as a consequence may retain the existing method. But if that occurs, it is only because the Commission is forced to admit that it has no good reason to make the change, and this Court should hardly be concerned about that.

The decision of the court below, insofar as it held that any change in a method of designing rates can be made only prospectively, would seem in theory to be important. It is not, however, very important in practice. Moreover, it is good policy.

The Petitioners rely on the decision of this Court in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), wherein this Court said that the Commission could make such changes retroactively. The issue there, however, was not whether the Commission could do it, but rather whether it was appropriate for the Commission to issue an order that would make it impossible for the pipeline to recover its cost of service if the Commission should later require it to implement a change in rate design retroactively. All parties in *Tennessee* assumed that the Commission could make a change retroactively under Section 4. Consequently, the Court did not hold it. More to the point here, the case suggests,

as is often the case, that the Commission is more concerned about getting the overall level of rates down as quickly as possible before it decides how the pipeline's system costs will be shared by its customers. *Tennessee* is consistent with the practice that is often followed by the Commission: cost of service issues are settled as quickly as possible and changes in rate design are implemented prospectively from the date of the decision.

We believe the Court's interpretation of the statute is permitted by the language of the statute. It is clear that it is consistent with the public interest. The court below said that placing the burden on the pipeline would be unfair to the pipeline. We agree with that, but we think it is more important to note that if the Commission had the power to implement changes retroactively and actually exercised that power, the pipelines would be forced to protect themselves against all conceivable rate designs by filing very high rates, which would lead to large refunds and thereby a shifting of the burden of future costs from future customers who get the refunds to present customers who would pay the high filed rates. Since the Commission rarely, if ever, exercises the power that the Petitioners claim it has, the decision of the court below, insofar as it eliminates retroactivity, will not have any practical significance other than to eliminate the requirement that the Commission explain and then defend as it did here at the insistence of the Petitioners from North Carolina why it has decided to implement the change only prospectively. In short, the Commission is probably better off without the power to implement changes in rate design retroactively.

2. The Petitioners contend that even if the rule established by the court below were correct when applied to past decisions made on the record after a full hearing, it is incorrect to apply it to methods of designing rates incorporated in settlements that are merely accepted by the Commission. The contention is specious.

There is no basis in law for a distinction between methods incorporated in settlements and methods adopted by the Commission after a full hearing. The law says that the pipelines must charge just and reasonable rates and the Commission has no authority to accept a settlement of a rate case that will result in charging anyone rates that are not just and reasonable. The contention of the Petitioners is based on the premise that the Commission actually accepts methods of designing rates incorporated in settlements that are not just and reasonable simply to relieve itself of its workload. The Commission has no authority to do any such thing; and, consequently, there is no reason to establish the requested distinction in order to permit the Commission to do it.

The Commission does not, in fact, accept unjust and unreasonable methods of allocating costs in order to relieve itself of its workload. The Petitioners' contention reflects the pretense that there is a right way to allocate costs that will produce nondiscriminatory rates and the right way is the way the Commission prefers to do it. But there is no right way to design rates by allocating fixed costs. It is not simply that the right way cannot be applied precisely, but rather that there is no way that is right in theory. Moreover, until the Commission speaks, it is impossible to know what it prefers. There are many different ways of allocating costs, which is why the issue is litigated and also why the issue can be settled and why when the Commission approves a settlement it is not adopting an unjust method but simply one of the many possibilities that are within the range of methods that it might determine produce just and reasonable rates.

The Petitioners claim that the decision of the court below will inhibit the settlement process. We think that the contention is totally irrelevant to whether settlements should be treated like decisions on the record and wrong in any event. We do not think

the decision will have any impact on the process.

One can imagine all sorts of reasons why the decision below will make the calculations of parties considering settlements somewhat different, but it is impossible to determine, *a priori*, whether those calculations will be more or less complicated or whether the process will be inhibited or enhanced. It does seem, however, that if the law gave Section 5 protection to methods of designing rates adopted by the Commission after a full hearing and did not give that protection to methods incorporated in settlements, there would be more litigation, not less. If the law made that distinction, a party would want to litigate cases for no other reason than to get Section 5 protection against the whims of future Commissions.

3. Although we do not believe that the decision of the court below, insofar as it held that the Commission can change an existing method of designing rates only pursuant to Section 5, will have any material impact on the Commission's powers and, therefore, does not raise an important question, we do not mean to suggest that we do not think the decision was significant. As we see it, the essential holding of the court below was that the Commission cannot change an existing method of designing rates without explaining in a manner that is decipherable by the courts how what it has decided to do will achieve its stated objective. The court applied the rule it had established in *Columbia Gas Transmission Corp.* v. *FERC*, 628 F. 2d 578 (D.C. Cir. 1979) wherein it said that the Commission cannot change an established method of designing rates simply by saying that in its judgment the result achieved by the change will be appropriate. Reasoned decision-making requires that the Commission explain what it is doing.

It is important to note that neither the Commission nor anyone else sought review of the decision of the court in *Columbia* and

none of the Petitioners here are seeking review of the decision below insofar as it relied on *Columbia*. It is also important to note that the decision in *Columbia* assumed that the Commission did have the power to change a rate design pursuant to Section 4 provided that it engage in reasoned decisionmaking. Therefore, even if this Court takes this case and reverses the court below with regard to its Section 5 pronouncements, the essential finding of the court below would remain undisturbed.

The Petitioners do contend that the rule of *Columbia*, although correct when applied to decisions on the record, should not be applied to methods incorporated in settlements. But again, there is no basis in law for making a distinction between decisions on the merits after a hearing and acceptance of settlements, regardless of whether the question is to give the former but not the latter the protection of Section 5 or merely sound reasoning. Consequently, in our judgment, their contention does not raise an important question that deserves a hearing before this Court. Moreover, it is hard to understand the Commission's complaint. If an existing method of designing rates reflects mere numbers and not the cost of service, it should be a rather simple task to explain how some other method better reflects the cost of service. Neither Section 5 nor sound reasoning will create an impediment to any such change and neither did so in this case. The Commission's problem here is due to the fact that it merely switched from one method that reflects numbers to another method that reflects some other combination of numbers, and it did not and could not explain to the court that it was doing anything else.

4. The Petitioners other than the Commission contend that the court should have remanded the case to the Commission so that the Commission could reconsider the issue in light of the court's

decision. We disagree. The court held that the Commission not only did not make the findings required by Section 5, but also that it did not comply with the requirements of *Columbia*. If the court below had only determined the former, a remand might be appropriate; but since it also determined the latter, a remand under the circumstances of this case would be a waste of time. The court below held that the Commission has not explained how mcf-mile results in rates that better reflect the cost of service; and since the Commission has been given every opportunity to explain it, its failure to do so implies that mcf-mile is inexplicable. Consequently, remanding the matter to the Commission will serve no purpose other than to give the Commission another opportunity to indulge in more of the same type of "conclusory" reasoning that went into Opinion 59.

It is significant that the Commission does not make this contention. It apparently recognizes the futility of trying to justify the change to mcf-mile in a manner that will satisfy the rule of *Columbia*. But that implies that it recognizes that it in fact has no good reason to make the change. And that in turn implies that this Court has no good reason to take this case.

5. The Petitioners argue that the decision of the court below will effectively establish *de facto* trial *de novo* in the Courts of Appeals with far less assurance of informed and expert judgments. We disagree. The decision only means that the Commission must engage in reasoned decisionmaking. Although ratemaking may be a legislative function, it does not have to be a political act. It is sound policy to delegate that task to an administrative agency and not just presume but require that that agency apply some amount of expertise to the issues presented to it. Part of being an expert is to be able to explain what one is doing in a manner that is intelligible to reasonably intelligent people; and as the court said in *Columbia*, if the Commission cannot explain

what it is doing in a manner intelligible to the courts, there are probably gross flaws in its reasoning. Only if the courts insist on intelligible explanations can society have any assurance whatsoever that expert judgment is, in fact, being applied to the task of designing rates for the interstate pipelines. The decisions of the court below in *Columbia* and this case are important because they will help provide that assurance. By issuing the requested writ and then reversing, this Court can only destroy that assurance.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 80-1937, 80-1938, 80-1939, 80-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION, NORTH CAROLINA UTILITIES COMMISSION, AND NORTH CAROLINA NATURAL GAS CORPORATION, *et al.*

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*

Respondents,

TRANSCONTINENTAL GAS PIPELINE CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

In the opinion of the respondent, Public Service Commission of the State of New York, the issues presented by the petitions for certiorari from the opinion below are:

1. Whether the Commission could order a modification of the zone rate structure in effect of the Transco pipeline system for over 17 years without compliance with the provisions of Section 5(a) of the Natural Gas Act, where Transco had sought to increase its jurisdictional rates but had proposed no change in its zone rate structure.
2. Whether the Commission could avoid compliance with the requirements of Section 5(a) because the zone rate structure had originally been the product of a settlement.
3. Whether the Court of Appeals correctly set aside the Commission's opinion below when it determined that the Commission had failed to conform to the requirements of Section 5(a).
4. Whether the Court's affirmance of the Commission prescription of a 14% rate of return for Transco is inconsistent with its reversal of the Commission's prescription of a new zone rate structure.*

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*The petition filed by the Federal Energy Regulatory Commission in No. 80-1937 correctly lists the parties to the case below.

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Nos. 80-1937, 80-1938, 80-1939, 80-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION, NORTH CAROLINA UTILITIES COMMISSION, AND NORTH CAROLINA NATURAL GAS CORPORATION, *et al.*
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*
Respondents,

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINION BELOW *

The Public Service Commission of the State of New York (New York), a respondent in Case Nos. 80-1937, 80-1938 and 80-1939 and an intervenor below in Case No. 80-2143, herewith files its brief in opposition to the

*New York adopts and incorporates by reference the jurisdictional statement of the Petitioner — 80-1939. (Pet. 2).

petitions and cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision of September 24, 1980 in *Public Service Commission of the State of New York, et al.* v. *FERC*, 642 F.2d 1335 (1980) (Pet. 1a-27a).[1]

STATEMENT OF THE CASE

These are petitions for certiorari from a decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of the State of New York, et al.* v. *FERC*, 642 F.2d 1335 (1980) (Pet. 1a-27a, 32a-33a). The Federal Energy Regulatory Commission (Commission), the North Carolina Utilities Commission and three North Carolina gas distributors have filed petitions, in Case Nos. 80-1937, 80-1938 and 80-1939 respectively, from that part of the Court of Appeals decision which reversed the Commission's Opinion No. 59 which had ordered the Transcontinental Gas Pipe Line Corporation (Transco) to place into effect a new zone rate structure assigning a substantially larger portion of the pipeline's costs to its rate zone 3. Transco has filed a cross-petition in Case No. 80-2143 requesting that any review of the lower court's opinion by the Court include the portion of the opinion below which affirmed the Commission's separate order prescribing a 14% rate of return on equity and ordering Transco to reduce its rates and make refunds to effectuate this determination.

Transco is a major interstate pipeline providing service, primarily from gas produced in Texas and Louisiana and the offshore federal domain adjacent to those states, to local distribution companies in states

[1] In this pleading, we use the notation "Pet.)" to refer to the Commission and Court opinions and orders set out as appendices to the Commission's petition in Case No. 80-1937, and "(Tr. Pet.)" to references to the Commission orders set out only in the Transco cross-petition in Case No. 80-2143.

extending from Alabama to New York. The pipeline has three rate zones: Zone 1, extending from the Louisiana-Mississippi border through Alabama and Georgia; Zone 2, covering the area between the Georgia-South Carolina border and the Virginia-Maryland border, and Zone 3 covering all areas north of Zone 2 to the system terminus in Southern New York.

The zone rate structure in existence on the Transco system was established by a 1962 order of the Federal Power Commission (predecessor to the FERC) in *Transcontinental Gas Pipeline Corp.*, 27 F.P.C. 187 (1962). This order approved a settlement among all parties to a pending proceeding providing for a rate differential at a 100% load factor of 2.8 cents per Mcf between Zones 1 and 2 and of 3.6 cents per Mcf between Zones 2 and 3 as being "in the public interest and appropriate to carry out the provisions of the Natural Gas Act" (27 F.P.C. at 189). On a number of occasions between 1962 and 1976, Transco made filings with the Commission to increase its rate level but proposed no changes in the existing zone rate structure. In eight separate orders, the Commission approved settlements which aproved higher rates but in each case left unchanged the existing zone rate structure.

The present Commission proceeding was instituted by a filing of July 30, 1976, in which Transco once again sought a general increase in its jurisdictional sales rates but proposed no change in the existing zone rate structure. The Transco filing was suspended and set for hearing by the Commission. Settlement negotiations then ensued at which, in addition to issues as to the proposed rate increase, both the Commission staff and the North Carolina parties raised questions as to the continuing validity of the zone rate structure. Eventually a settlement was reached on many of the issues which had been raised with respect to the Transco rate increase, but no agreement could be reached with

respect to the appropriate rate of return it should be allowed to earn on equity, an important cost factor in determining the validity of the rate level sought by Transco, or on the zone rate issue. Separate hearings, Initial Decisions and Commission orders on both of these issues ensued.

With respect to the appropriate rate of return on equity, the Presiding Law Judge in his Initial Decision (Tr. Pet. 4a-19a) determined that a 14% equity return would be just and reasonable in lieu of the 17% sought by Transco and the 13.5-13.75% proposed by New York. This determination was affirmed by the Commission (Tr. Pet. 1a-2a) and a petition for rehearing denied (Tr. Pet. 3a).

In a separate Initial Decision (Pet. 55a-62a), the Presiding Law Judge rejected the proposals for any change in Transco's existing zone rate structure, holding that the evidence of record did not support any increase in the rate differentials between Zone 3 and the other zones but, on the contrary, indicated that Zone 3 was already bearing more than its fair share of Transco's costs (Pet. 61a-62a).

The Commission in its Opinion No. 59 (pet. 36a-52a) reversed the Initial Decision and adopted a new zone rate structure based upon a "Mcf-Mile" study which, in weighting the relative cost responsibility of the various zones, gives consideration solely to the distance of haul. In reaching this conclusion, the Commission did not review the evidence of record, find the existing zone structure unjust, unreasonable, or unduly discriminatory, and substitute a new rate structure more consistent with the record facts. Instead, though it insisted that only cost factors were material to a proper zone rate structure (Pet. 39a, 49a), it started from the assumption that a Mcf-Mile study would best accomplish this cost allocation objective (Pet. 39a-40a), and placed upon Transco, and the Zone 3 parties

supporting the existing zone rate structure, the burden of demonstrating that other cost factors justified maintenance of the existing zone rate differentials (Pet. 40a). Then, ignoring the testimony introduced by the Zone 3 parties demonstrating that on a cost basis the existing zone structure was, if anything, overly favorable to Zones 1 and 2 (see Pet. 20a), it rejected the significance of the record evidence of the various factors which the Zone 3 contended showed that the existing rate zone structure did not discriminate against Zones 1 and 2. These factors included (a) the historical development of the Transco system to serve the loads in Zone 3,[2] (b) the higher load concentration in Zone 3, (c) the higher load factor of the Zone 3 customers and (d) the existence of major storage facilities in Zone 3 utilized by customers in Zones 1 and 2 to reduce their costs. While all of these factors had been held to be relevant to a proper zone rate structure in previous Commission determinations, the Commission held that Transco and the Zone 3 customers had not shown that they justified any deviation from the Mcf mile methodology which the Commission favored (Pet. 49a-50a).

The court below reversed the Commission zone rate determination but affirmed its rate of return determination (Pet 1a-27a). It concluded that, since Transco had not sought any change in the existing zone rate structure and the zone rate structure was not a cost factor underlying Transco's proposed rate increase, no change in the zone rate structure could be ordered by the Commission unless it complied with the requirements of Section 5(a) of the Natural Gas Act (Pet. 10a-17a). These requirements, the court held, had not been met because the Commission's decision "did not

[2]*See Colorado Interstate Gas Co.* v. *FPC*, 325 U.S. 581, 591-92 (1944) where this Court stressed the importance of this factor in affirming a Commission decision rejecting mileage-based rates.

determine that the old zone rates were unjust and unreasonable and because it did not provide a reasoned explanation for departure from settled practice" (Pet. 10a). The Commission, the court further concluded, had erred "in placing the burden of proof on the opponents of the change in cost allocation rather than upon itself" (Pet. 20a). The court also held that "in any event, the evidence of record" supporting the Commission's prescription of a new zone rate methodology "falls short of substantiality" (Pet. 21a).

With respect to the Commission's rate of return determination, the court rejectd Transco's contention that the rationale for the Commission decision was unclear or not based upon substantial evidence (Pet. 21a-24a). It also rejected the argument that the Commission had improperly failed to explain why it had fixed a rate of 14% rather than the 14.75% authorized by way of settlement in two prior Transco proceedings. Pointing out that, unlike the situation with the zone rate allocation, the Commission's rate of return determination was based upon essentially the same methodology it had previously followed and Transco had itself utilized in the present case, the court concluded that, in such circumstances, the Commission was not required to detail why it did not choose all other possible results which might have been justifiable in determining where, within a range of reasonableness, it would fix the pipeline's just and reasonable rate of return on equity (Pet. 24a-26a).

REASONS FOR DENYING WRIT

The principal issue in this case is whether the court of appeals properly held that the Commission had violated the Natural Gas Act, 15 U.S.C. 717 *et seq.*, in ordering a substantial revision of the zone rate structure under which the Transco system had been operating for seventeen years. The court below concluded that, since Transco in seeking to increase its rates had not sought to

change the existing zone rate differentials and the zone rate structure was not a cost factor underlying Transco's proposed rate increase, any action to change the zone differentials had to comply with the procedures of Section 5 of the Act governing rate changes not initiated by the pipeline, rather than the rate increase provisions of Section 4 under which the pipeline has the burden of proof. The court determined that the Commission had not complied with Section 5 since it had neither determined that the existing zone rate structure was unjust, unreasonable or unduly discriminatory, nor provided a "reasoned explanation for departing from settled practice" (Pet. 10a). It also concluded that "in any event, the evidence of record supporting that prescription [of new zone rate differentials] falls short of substantiality" (Pet. 21a).[3]

[3]The North Carolina distributors, alone among the petitioners, challenge this independent basis for the court's reversal of the Commission's opinion. At page 27 of their petition they suggest that rather than remanding the case to the Commisison to correct its legal error, the court below "proceeded to cull from the record" material favorable to the Zone 3 position while ignoring answering testimony and that this action constituted a "gross misapprehension of the substantial evidence test which warrants the intervention of the Court." This is, we suggest, a completely unfair description of the court of appeals discussion of the failure of the Commission to give any consideration to the Zone 3 testimony indicating that the existing zone rate structure was "a more accurate reflection of cost incurrence" (Pet. 20a), that the Commission had failed to explain the inclusion in its study of upstream gathering facilities whose costs do not vary to any extent because of their distance from Transco customers (*ibid.*), and that the Commission's stated reasons for ignoring the substantially greater load concentration in Zone 3 and the existence of storage facilities in Zone 3 utilized by customers in Zones 1 and 2 were not persuasive (Pet. 18a-19a, n.20). The record basis for Commission conclusions of this type is exactly the type of issue which this Court in *Mobil Oil Co.* v. *FPC*, 417 U.S. 283, 309-10 (1974) stated was a matter for review by the court of appeals rather than this Court, and nothing has been shown conceivably justifying an exception in this case.

The decision below is sound and involves no conflict with opinions of this Court or the other circuits. Nor is any genuine issue as to the administration of the Natural Gas Act presented which warrants plenary review by this Court.

1. The petitioners' primary legal challenge is to the lower court's determination that any Commission ordered change in zone rate structure on the Transco system must comply with the procedural standards of Section 5(a) of the Natural Gas Act. Petitioners contend that whenever a pipeline files a rate increase it not only has the burden under Section 4 of the Act of justifying that increase, but of all other aspects of its existing rate structure, including zone rate differentials, even though they are neither directly nor indirectly determinative of the rate increase it seeks and no change therein is sought. Accordingly, it is argued, the Commission was free in this case to impose a different zone rate structure it presumed to be more in the public interest, unless the pipeline could affirmatively demonstrate the superiority of the existing structure. The basic difficulty in the argument is its failure to distinguish between a pipeline sponsored rate increase and elements of the pipeline's rate structure which do not affect the revenues to be received by the pipeline but determine, instead, how such revenues are to be allocated between its various categories of customers.

This Court has made clear in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956), that under the Natural Gas Act "the basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory or preferential:"

> . . . Section 5(a) would of its own force aply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the

> latter case the power is implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power in the case of a newly changed rate or contract . . . , the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive by means of the refund procedure, to the date the change became effective.

In addition, where "a rate or change" is sought to be increased, Section 4(e) places the burden of proof of showing that the increase is just and reasonable upon the pipeline.[4]

The court below concluded that the existing Transco zone rate structure, was not a factor in, or determined by, the rate increase sought by Transco, and thus could be modified by the Commisison only pursuant to the provision of Section 5(a). The petitions largely ignore the distinction drawn by the court[5] and focus instead

[4]Even with respect to the pipeline's rate level, the existing rates can only be reduced prospectively pursuant to a determination in Section 5 of the Act. As this Court held in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23-24 (1968), any rate which has been finally established in a valid Commission order, constitutes the "lower limit below which a refund cannot be ordered under § 4(e)." The Commission, of course, is not forever precluded from reducing a pipeline's rate level below that of the "last clean rate" level, but to do so it must proceed under Section 5(a) of the Act, under which it rather than the pipeline, has the burden and its action is prospective only.

[5]The petitioners make a half-hearted effort to suggest that, since the rates to the different zones rise by the amount of the existing differentials as a result of any Transco rate increase, the zone rate structure is itself an integral part of the rate increase. But the differential in rates between the zones remained undisturbed during the period Transco's rate increase was suspended and would not be affected by a total acceptance or rejection of the rate increase.

upon a question not involved in the case. This is whether, when a pipeline makes a rate increase filing under Section 4 of the Act which purports to justify the higher rate upon asserted increases in the cost of some of the underlying components, the Commission is required to proceed under Section 5 if it wishes to offset the increased costs by reductions in other cost factors. Such an issue would arise if, for example, a pipeline posited a rate increase on a claimed need for a higher rate of return, but proposed no change in depreciation rate, and the Commission concluded on the basis of record evidence that the depreciation rate should be reduced to a degree which would match the approved increase in return.

The Commission petition argues at length that all factors material to a determination of a pipeline's just and reasonable rate level are put in issue when a pipeline seeks a rate increase regardless of whether it justifies the increase solely on the basis of changes in particular components. But the court below did not hold to the contrary and could not have done so since the issue was not before it. Any doubt as to this question is dispelled by the modification of the court's opinion made on rehearing in response to the Commission's Petition. Specifically, it deleted a paragraph (Pet. 15a-16a) which the Commission had contended would unduly limit its authority over rate increases, and substituted language (Pet. 32a-33a) which makes clear that its holding is based upon the fact that the zone rate structure was not part of Transco's rate increase:

> Transco's filing of a rate change continued to incorporate the existing zone rate differential. Had Transco proposed any changes in them, the Commission, acting under Section 4(e), could have approved the changes in whole or part. Section 4(e), however, cannot be used by the Commission to institute any change in a

> rate making component, such as cost allocation, *that does not represent at least partial approval of the change for which the enterprise* had petitioned in the filing. If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of Section 5(a). (emphasis added.) [6]

The Commission's petition suggests that certiorari is warranted because a number of parties in pending Commission proceedings have contended that the court of appeals opinion should be given a reading beyond what it purported to decide. The simple answer is that this Court does not give advisory opinions on matters not involved in cases decided by the lower courts. Thus, even if the opinion below was susceptible

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[6]Significantly, the Commission itself has denied that the opinion below holds that cost factors underlying a pipeline's proposed rate increase which it does not seek to change, can only be considered under Section 5(a). In *National Fuel Gas Supply Corp.* v. *FERC*, Case No. 80-1586 (D.C. Cir.), *dismissed on other grounds*, December 30, 1980, the pipeline had contended that the decision in the present case precluded the Commission from initiating a hearing under Section 4 of the Act to challenge a proposed rate increase on grounds that an element of the pipeline's claimed costs, which it did not propose to change, was improper. In opposing a motion for summary reversal, the Commission stated that the petitioner's reliance upon the opinion here was "misplaced" since "under the court's interpretation of the Commission's Section 4 authority in *Public Service Commission*, National Fuel would have the burden of proof to justify an increase in rates filed by the pipeline." (FERC Response in Opposition to Motion for Summary Reversal, p. 7). The Commission also noted that "here the Commission has chosen to examine a subject—the cost of purchased gas in storage—which is solely responsible for part of the company's rate increase request. In *Public Service Commissin*, the Commission chose to examine not something which directly triggered a price increase, but an underlying (albeit integrally realted) formula." (FERC Response in Opposition to Motion for Summary Reversal, p. 9).

to a broader reading than we believe is justified, it would be premature for the Court to attempt to resolve the issue.

2. When we turn to what the court below actually decided, the asserted basis for certiorari dissolves. Neither the language of the Natural Gas Act nor its legislative history[7] suggest that a "rate, change, classification or service" reflected in a pipeline's existing tariff, which is not itself sought to be changed by a pipeline filing under Section 4(d), and is neither determinative of or determined by a proposed rate increase filing, is subject to retroactive change under the provision of Section 4(e) of the Act. Nor is there anything in the Act which suggests that a pipeline has the burden of proving that unchanged elements of its tariff which do not affect a proposed rate increase are superior to any alternatives thereto which the Commission may believe are more in the public

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[7]The cases arising under the Interstate Commerce Act cited by the Commission do not support its position. *Ayrshire Colleries Corp.* v. *United States*, 335 U.S. 573 (1949), is fully consistent with the decision below: the ICC's action there to modify a rate which had not been sought to be changed by the carrier, was undertaken as a result of an investigatory proceeding initiated by the Commission under provisions of the Interstate Commerce Act analogous to Section 5(a) of the Natural Gas Act (see 335 U.S. at 581-83) and the Court held that the Commission had met its burden of justifying rate changes initiated by it (355 U.S. at 586). *Advances in Rates - Western Case*, 20 I.C.C. 307 (1911) is similarly inapposite. The Commission held that in its consideration of the railroads' initial rate filings after the passage of the Mann-Elkins Act of 1910, 36 Stat. 539, *et seq.*, the carriers had the burden of justifying the entire rate and no "grandfather" rights existed with respect to existing rates which had not previously been subject to regulation by the Commission. (*Cf., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978)). There was no suggestion that the carriers' filings, in addition to putting into issue the entire rate sought to be increased, imposed a burden on the carrier with respect to practices or classifications not sought to be changed.

interest. On the contrary, the dichotomy between changed and unchanged parts of a pipeline's tariff, as this Court pointed out in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp., supra,* is an integral element of the legislative scheme. Moreover, even in the case of pipeline initiated changes subject to the provision of Section 4(e), the burden of proof falls upon the pipeline only where the proposed change involves a rate increase. *See American Louisiana Pipeline Co.* v. *FPC,* 344 F.2d 525 (D.C. Cir. 1965).

Contrary to the Commission petition (pp. 13-14) there is no consistent Commission construction of the Act as authorizing it to order changes in existing cost allocations, rate zone differentials or rate designs, not sought by the pipeline, pursuant to the provisions of Section 4(e) of the Act. While the Commission, as a matter of administrative convenience, has frequently considered pipeline proposed rate increases and cost allocation or rate design questions raised by parties other than the pipeline in the same proceeding or opinion, in most of the cases cited in the Commission petition no claim was made that the pipeline had the burden of proof with respect to anything but its proposed rate increase. In those cases where the issue has been decided either by the Commission or the courts it has uniformly been held that the party seeking the change in the particular tariff element has the burden of proof. *See Northern Natural Gas Co.,* 14 F.P.C. 11 (1955) *affirmed sub nom., Interstate Power Co.* v. *FPC,* 236 F.2d 372 (8th Cir., 1956) *cert. denied,* 352 U.S. 967 (1957); *Michigan Wisconsin Pipe Line Co.,* 34 F.P.C. 621 (1965); *Columbia Gas Transmission Corp.* v. *FPC,* 628 F.2d 578 (D.C. Cir., 1979); *American Smelting and Refining Corp.* v. *FPC,* 494 F.2d 925, 941 (D.C. Cir., 1974) *cert. denied,* 419 U.S. 882 (1970); *State of Louisiana* v. *FPC,* 503 F.2d 844, 861 (5th Cir., 1974).

FPC v. *Tennessee Gas Transmission Co.,* 371 U.S. 145

(1962), relied upon by the petitioners, is not inconsistent with the opinion below. In contrast to the present case where Transco proposed no change in its rate zone structure, Tennessee in a July 1, 1957 rate filing had proposed a significant change in its existing zone rate structure. *See Tennessee Gas Transmission Co.*, 27 F.P.C. 202, 206, 230-231 (1962). This change in zone rate structure was suspended and set for hearing under Section 4 of the Act, and was in effect subject to refund, after the end of the statutory suspension period, when Tennessee on October 5, 1959, made the new filing seeking the increase in rates which resulted in the interim order reducing the rate of return sought by the pipeline approved by this Court in *FPC* v. *Tennessee Gas Transmission Co., supra.* The references in this Court's opinion to the possibility of additional refunds as a result of the continuing proceeding on the propriety of the pipeline's existing zone rates, thus are not even dicta for the proposition that the Commission could modify rate zone structures which the pipeline has not sought to change other than under Section 5 of the Act.

3. The petitioners also contend that the Commission was not required to comply with the requirements of Section 5(a) of the Act in ordering a change in Transco's existing zone rate structure, since it had initially been approved by the Commission as part of a settlement. The argument incorrectly assumes that the lawful "rates, charges, practices and classifications," which can only be changed on the Commission's initiative pursuant to the procedures mandated by Section 5(a) of the Natural Gas Act, are those which have been expressly approved by the Commission in a litigated proceeding as meeting the substantive standards of Sections 4(a) and (b).

There are four paths by which rates, charges, classifications or services may become the lawful ones which the pipeline is obligated to follow until it seeks to

change them pursuant to Section 4 filing or the Commission directs a change pursuant to Section 5. They may be "initial filings" under Section 4(c), not subject to the provisions of Sections 4(d) and (e) relating to pipeline initiated changes. They may be pipeline proposed changes which the Commission allows to go into effect without any determination as to whether they meet the standards of Sections 4(a) and (b). They may, as here, be the product of a settlement of a proceeding, originally set for hearing pursuant to Section 4(e), which the Commission approved as being "in the public interest and appropriate to carry out the provisions of the Natural Gas Act." Or, they may be the product of a Commission decision in a litigated proceeding in which it either finds that a change proposed by the pipeline was just and reasonable and not unduly discriminating or preferential, or prescribes a rate, charge, practice or classification meeting these standards after determining that the existing or proposed one does not. In all four of these situations the resulting rate, charge, practice or classification becomes the lawful "filed rate" which, unless a change is proposed by the pipeline, can only be modified pursuant to the provisions of Section 5 of the Act. *See Arkansas Louisiana Gas Co.* v. *Hall,* 49 U.S.L.W. 4947 (July 2, 1981).

When the Commission allows a pipeline proposed change in an element of its tariff to become effective without suspension, it does not approve the change or certify that it is consistent with the standards of Section 4(a) or (b) of the Act. On the contrary, Section 154.23 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.23, expressly states that "the acceptance for filing of any tariff, contract or part thereof is not to be considered as approved by the Commission." Yet, even where fraud may have led to the Commission's acceptance of the proposed change

without suspension, the new rate charge, practices or classification can only be modified, where the pipeline does not take the initiative to do so, pursuant to the provisions of Section 5 of the Act. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). It has not been suggested that if the existing Transco zone rate structure had resulted from a pipeline proposal which the Commission had allowed to become effective in 1962, and the Commission, on its own motion or at the request of one of the North Carolina distributors subsequently initiated a proceeding to determine whether the zone rate structure was unduly discriminatory, it could proceed under Section 4 rather than Section 5. Certainly the lawful zone rate structure was no more vulnerable to preemptory change unless the pipeline could prove its validity where, as here, it had been approved by the Commission in a series of orders extending over a 14 year period. In short, the fact that the zone rate structure was the product of a settlement which could not be cited as a precedent or *res judicata* in subsequent proceedings any more than if the rate structure had been merely accepted for filing, does not shift the burden of proof in such proceedings from those proposing to change the existing lawful zone rate structure.

The argument that the court of appeals opinion threatens to vitiate the settlement procedure which has proven to be a valuable tool for the Commission in carrying out its rate responsibilities under the Natural Gas and Federal Power Acts is, we respectfully suggest, pure hyperbole. The reasons why pipelines or utilities, their customers and other intervening parties are willing to settle some or all of the issues presented in rate proceedings are numerous and varied, and there has been no showing that knowledge that a settled rate, charge, practice or classification has the same legal

status as a litigated one insofar as the application of Sections 4 and 5 to future proposed changes are concerned, will have any impact upon the various parties' willingness to settle.

As detailed in the Opposition to Certiorari being filed by the Zone 3 Customer Group, the opinion below has not, contrary to the suggeston of the petitioners, resulted in any reduction in the number of settlements presented to the Commission for full or partial resolution of rate proceedings filed under either the Natural Gas or Federal Power Acts. Moreover, since all issues relating to the propriety of a rate increase sought by a pipeline or public utility, or underlying its cost presentation in support of the higher rate, remain in issue in the Section 4(e) proceeding on its proposed rate increase, the impact of the decision below upon settlement of the rate proceedings initiated by pipelines or utilities should not be significant. On the contrary, the knowledge that a rate increase filing does not put in jeopardy all other facets of a tariff may well enhance prospects for settlement.[8]

4. Transco's efforts in its cross-petition to bring its complaints with the Commission's rate-of-return determination within the umbrella of the court of appeals' holding with respect to the zone rate structure are unpersuasive. The primary difference between the

[8]The North Carolina petitioners, but not the Commission, seek to raise an additional issue stemming from the fact that the court below not only reversed the Commission opinion, but set it aside, rather than remanding the case for further Commission proceedings. The argument fails to recognize that the court held the Commission had failed to proceed under Section 5 of the Natural Gas Act, which permits only prospective changes in a pipeline's tariff, and that there was no substantial record support for the Commission prescription of a new zone rate structure. Under those circumstances the court's order setting aside Commission Opinion No. 59 was proper and certainly raises no issue warranting plenary consideration by this Court.

two situations is, of course, that Transco initiated a rate increase proceeding under Section 4(e) of the Act, based in large part upon its claim for a higher rate of return. It thus clearly assumed the burden of proof on the rate increase and all cost elements material thereto, as well as subjecting itself to refunds of any part of the increase found to be unwarranted. Moreover, as the court below noted (Pet. 26a), the Commission, in fixing a return on equity of 14%, in lieu of the 14.75% rate adopted by way of settlement in the two prior proceedings, was not, as in the case of its imposition of a new zone rate structure, applying a new methodology arguably requiring a more detailed justification. It was, instead, making a judgmental determination, based on substantial record evidence and a sufficiently reasoned discussion of the basis for its conclusion, as to where, within the range of reasonableness, the pipeline's allowance for return on equity should be fixed. In short, the court of appeals conclusion on the rate of return issue was exactly the type of review of agency action which this Court has made clear is not a basis for certiorari. *See Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 306-310 (1974).

CONCLUSION

No basis has been shown in the several petitions for a writ of certiorari warranting plenary review of the court of appeals' opinion in this case. The petitions should, accordingly, be denied.

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Nos. 80-1937, 80-1938, 80-1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Federal Energy Regulatory Commission,
North Carolina Utilities Commission,
North Carolina Natural Gas Corporation, *et al.*,
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v.

The Public Service Commission of
The State of New York,
Long Island Lighting Company,
The Brooklyn Union Gas Company, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF N.C. NATURAL, *ET AL.* IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Section 5, 15 U.S.C. §717d 4, 8, 9

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North Carolina Natural Gas Corporation, Public Service Company of North Carolina, Inc., and Piedmont Natural Gas Company, Inc. (N.C. Natural, *et al.*)[1] hereby jointly submit their Brief in Reply to the briefs in opposition filed by the Public Service Commission of the State of New York (New York), The Brooklyn Union Gas Company, *et al.* (Zone 3 Customer Group), and Long Island Lighting Company (LILCO).

[1]In accord with Rule 28.1, N.C. Natural, *et al.* have listed certain subsidiaries and affiliates in their Petition for a Writ of *Certiorari* filed on Monday, May 18, 1981 in No. 80-1939.

1. All of the briefs in opposition urge this Court to condone the D.C. Circuit's judicial amendment of the rate provisions of the Natural Gas Act (Act). In order to do so, this Court would have to ignore the plain meaning of Section 4 of the Act and adopt an interpretation thereof which runs counter to Congress' clear purpose "to protect consumers against exploitation at the hands of the natural gas companies". *E.g., FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972). Further, the Court would have to overrule its own and other Court of Appeals' decisions on point.

Section 4 of the Act, in plain language, gives the Commission the power to determine "the lawfulness of [a] rate" when a regulated company files "increased rates or charges" and to *cure* any unlawfulness in such increased rates, as "the Commission may ... order such ... company to refund, with interest, the portion of such *increased rates or charges* ... found not justified" (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)).[2] Thus, Congress was clearly concerned in the Act with protecting *consumers* from unlawful *increased rates*, regardless of what caused such unlawful increases.[3]

2. It is significant that New York's suggested judicial amendment of the Act is *different* from that undertaken by the D.C. Circuit and supported by Transcontinental Gas Pipe Line Corporation (Transco) in Transco's June

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[2]Emphasis added throughout this brief unless otherwise indicated.

[3]That any question as to what constitutes an "increased rate" must be examined from the *consumers' perspective* is supported not only by the plain words of the Act, but by this Court's decisions consistently holding that the purpose of the Act is to "afford *consumers* a complete, permanent and effective bond of protection from *excessive rates and charges.*" *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 278, 388 (1959).

17, 1981, cross petition in No. 80-2143. New York argues that only where the regulated company is seeking an *overall increase in revenues* from all of its rates, and only to this extent, should the Commission be permitted to retain the Section 4 powers which Congress has prescribed (New York Br., e.g., pp. 8-9). However, whether or not a regulated natural gas company has or has not sought an *overall* increase in its *revenues* by raising all of its rates is an entirely different matter from the concern of Congress expressed in the plain language of Section 4. The Commission's Section 4 curative powers are triggered when there has been an increase in *"a rate or charge"* (FERC Pet. App. I, p. 65a, 15 U.S.C. §717c(e)), not simply when and to the extent that the regulated company seeks *overall revenue* increases.[4]

The fallacy in New York's proposal, aside from the fact that it is contrary to the plain language of the Act, is that it would create absurd and grossly unjust gaps in the Commission's regulatory scheme mandated by Congress. For example, Transco, at the behest of its economically more powerful Zone 3 customers, could file totally unjustified increased rates for Zone 1 and 2 customers while decreasing its rates to Zone 3, and, so long as *overall revenues* were not thereby increased, the Commission and the Zone 1 and 2 customers would

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[4]New York's claim that the zone cost allocation on the Transco system is "neither directly nor indirectly determinative of the rate increase [the pipeline] seeks" (New York Br., p. 8) is not correct. The statement could only be rendered correct (and, even then, only under certain conditions) if one were to substitute the words "increase in revenues" for "rate increase". The levels of the *"increased rates"* (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)) are very much a function of the cost allocation used in developing these rates. Indeed, that is the *reason for the cost allocation litigation in this case* — the Zone 1 and 2 rates were increased too much because of the misallocation of transmission costs.

have *absolutely no Section 4 curative authority as to Transco's increased rates in Zones 1 and 2.*[5] Under New York's theory, any correction in such rates by the Commission would be prospective only, after a lengthy investigatory hearing under Section 5 in which the Commission bore the burden of proof. Until such change ultimately was made, Zone 3 customers would reap an enormous windfall for which absolutely *nothing* could be done.[6] That the Commission's clear authority under the Act should be so circumscribed by judicial amendment is absurd on its face, and would constitute a radical departure from the Commission's past perception of its authority under the Act. *See Kentucky West Virginia Gas Co.*, FPC Opinion No. 416, 31 FPC 141 (1964).

New York's attempt to characterize the issue of cost allocation as a "non-cost" aspect of Transco's tariff is at

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[5]Also, many of the large New York and Philadelphia customers of Transco are served by other pipelines in addition to Transco, and Transco might well conclude that, to meet the competition, it would be desirable to serve its Zone 3 customers at *below* cost, so long as the loss could be made up by above cost rates to the Zone 2 customers (most of whom are wholly dependent upon Transco).

[6]Similarly, Transco could continue, as in the past, to file increased rates which shift ever greater portions of its pipeline system's transmission costs to Zone 1 and Zone 2 customers, and away from the Zone 3 customers, yet the Commission would have no power under Section 4 to order refunds to cure such unjust, unreasonable and unduly discriminatory increased rates.

best a semantic sleight-of-hand (New York Br., p. 8).[7] This contention ignores the fact that under the plain words of the Act the Commission's Section 4 powers are triggered by *"increased rates"* to the consumer (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)); whether or not there are "increased costs" to (or "increased revenues" sought by) the regulated company is not at issue. Further, attempting to argue that Transco's "rate structure" is not a result of the "increased rates" Transco filed is untenable on its face.[8]

4. New York's proposal that this Court condone the D.C. Circuit's judicial amendment of the Act on the basis of New York's "increased revenues"

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[7]It should be noted that New York's argument goes well beyond the more modest contention, rejected by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 643-45 (1972), that FERC's power to suspend tariff changes and order refunds does not extend to *non-rate changes* (*i.e.* changes in the terms and conditions of service). Confronted with the contrary holding in *Louisiana Power* —and the situation presented here is clearly an *a fortiori* one—the Court of Appeals opined that that decision and the uniform line of cases following it might have accounted for the Commission's "confusion" over its statutory powers (FERC Pet. App. A, p. 14a). With due respect to the Court below, we would suggest that the Commission exhibits neither reversible error, nor even "confusion", when it follows the holdings of this Court.

[8]New York's brief is replete with references to Transco's "zone rate structure" (New York Br., e.g., p.3), as if such a structure were something *separate* from the rates and somehow dependent upon the 1962 negotiated zone differentials. As discussed in N.C. Natural, *et al.'s* petition (p. 10), FERC Opinion No. 59 did nothing to eliminate *zoned rates* on the Transco system. However, if by "zone rate structure" New York means some sort of *relative* relationship in rate level, the continued use of the same fixed cents-per-Mcf rate differentials has actually made Zone 1 and 2 rates much higher relative to Zone 3 rates. Thus, if there is indeed some "structure" among the relative rate levels, *it has in fact been changed repeatedly by Transco's rate increase filings.*

interpretation seems to have been developed *ad hoc* to fit New York's position in favor of continued undue discrimination in Transco's rates, while attempting to avoid some of the other pitfalls of the Court of Appeals' (and Transco's, in its cross-petition in No. 80-2143) conclusion that only "changed elements" of a rate increase are subject to the Commission's curative powers under Section 4.[9] As New York is apparently well aware, the application of the D.C. Circuit's "changed element" interpretation would lead to a "ratcheting" upward of the natural gas company's rates with the Commission's curative powers under the Act effectively nullified.[10]. For this reason, New York is apparently unwilling to attempt to support the Court of Appeals' decision on cost allocation based upon the Court of Appeals' "changed element" approach.

5. New York and the Zone 3 Customers Group (but not LILCO) have attempted to argue that this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), is somehow "not inconsistent with" the

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[9]As explained in N.C. Natural, *et al.'s* petition in No.80-1939 (pp. 11-12, 13-14) and their brief opposing Transco's cross-petition in No. 80-2143 (pp. 9-11), the Act speaks of "increased rate[s] or charge[s]," not "increased elements" that may underlie or support such increased rates.

[10]For example, the company would be able to file increased rates reflecting a change in only one element (*e.g.* rate of return) while making no change in the other elements, including those elements which, if changed, would *lower* the rate. New York attempts to gloss over the inconsistency in the D.C. Circuit's opinion between the cost allocation decision and the rate of return decision by claiming that, as to rate of return "Transco initiated a rate increase" (*i.e.*, sought an increase in revenues) (New York Br., p. 18). However, Transco increased its rates in Zones 1 and 2 not only by an increased rate of return but also by an allocation of transmission costs which made the Zone 1 and Zone 2 rates too high (*i.e.* , the Zone 1 and 2 rates bore too large a portion of the system's increased transmission costs).

D.C. Circuit's opinion below, claiming that the pipeline in the *Tennessee* case had, in a separate earlier rate proceeding, filed rates reflecting "a change in zone rate structure" (New York Br., p. 14). New York's and the Zone 3 Group's contention is of course premised on their own theories that, notwithstanding the plain language of the Act, "increased rates" may only be reviewed (and unlawfulness therein cured) under Section 4 to the extent that such rates produce an overall revenue increase or, alternatively, to the extent of "changed elements" therein. However, if these theories were correct and the *only reason* that the pipeline in the *Tennessee* case had been required to "assume [ ] the hazards involved in" initiating a rate increase under Section 4 (371 U.S. 152) was that the pipeline had proposed a change in rate structure in an earlier rate case, surely such a *sine qua non* would have at least been *alluded* to in the Court's opinion. Yet, there is not a hint anywhere in the decision that the result of the case was *dependent upon this* particular posture of the earlier case.[11] N.C. Natural, *et al.* respectfully submit that these arguments stretch the bounds of credulity. It is apparent that this Court's decision in *Tennessee*, unlike the Court of Appeals' decision below, simply honored Congress' plain words in Section 4, as did the Tenth Circuit's decision in *Kansas-Nebraska Natural Gas Co.* v. *FPC*, 534 F.2d 227 (1976), wherein that Court followed this Court's *Tennessee* decision.

6. The Zone 3 Group contends that the D.C. Circuit had a right to ignore and override the Commission-

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[11]Under the New York and Zone 3 Group argument, the result of the case presumably would have been different if, for example, the Commission, rather than the pipeline, had sought the rate design change in the earlier case.

approved settlements as to cost allocation, because the "mere fact" that the 1962 zone rate differentials were part of a settlement wherein it was specifically agreed that such differentials would have *no* force and effect in the future "does not relieve FERC of its responsibility to act under §5(a)" (Zone 3 Customer Group Br., pp. 18-19). But, again, this argument rests on the assumption of the correctness of the "changed elements" theory of the court below. However, even if one were to assume *arguendo* that cost allocation were in fact a non-rate element of Transco's tariff which can only be changed by the Commission prospectively under Section 5, the "non-binding" provision of the settlement, to have any force or effect whatever, must have meant that all parties (including Transco) agreed that *whatever cost allocation method* Transco thereafter reflected in its increased rates would be considered *Transco's* proposed method. The agreement clearly provided that the cost allocation reflected in the settlement would be applicable only for the limited time period of the settlement and would not prejudice the parties' positions by being considered the *status quo* from which a change could only be effected prospectively by the Commission. The Court of Appeals decision inexplicably and unlawfully nullifies this critically important part of the Commission-approved settlement, *Cf. Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345, 357 (5th Cir. 1962), *cert. den.* 375 U.S. 941.

7. The Zone 3 Group attempts to demonstrate that the court decision below overriding the "non-binding" provision of the Commission-approved settlement has not significantly damaged the settlement process at the Commission. The Zone 3 Group cites the number of settlements which have been filed with the Commision since the Commission adopted its order instituting new settlement procedures in FERC Docket No. RM78-16

(Zone 3 Group Br., p. 21). However, these new procedures were specifically designed to *encourage* settlements (of all sorts — including many non-rate matters). Thus, these gross numbers reflect a myriad of factors other than the Court of Appeals' decision below, and therefore prove nothing. Further, the erroneous deduction which the Zone 3 Group wishes the Court to draw from these numbers simply flies in the face of common sense. A more direct and accurate thermometer for measuring the "chilling effect" on settlement is the fact that rate settlements now being filed have *special clauses attempting to disavow the applicability of the D.C. Circuit's opinion* (see our Petition, p. 25).

8. New York urges that the D.C. Circuit was justified in reversing, without remand, the Commission's decision because "the Court held the Commission had failed to proceed under Section 5 ... which permits only prospective changes in the pipeline tariff, and there was no substantial record support" for the Commission's decision (New York Br., p. 17, n. 8). The problem with this contention is that this Court has *directed* that once "an error of law is laid bare" by a court of appeals, such as the D.C. Circuit's finding here that the Commission had erred in failing to proceed under Section 5, "the function of the reviewing court ends", *Idaho Power Co. v. FPC*, 344 U.S. 17, 20 (1952). Thus, this Court has directed, consistent with the intention of Congress, that the *Commission* is to review the evidence under Section 5 and determine in the first instance if Section 5 findings can be made, and if not, whether further evidence is required.

CONCLUSION

For the reasons discussed in our petition and herein, the petitions for a writ of certiorari as to the cost allocation issue should be granted.

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LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY FOR PETITIONER NORTH CAROLINA UTILITIES COMMISSION

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REPLY FOR PETITIONER NORTH CAROLINA UTILITIES COMMISSION

The petitions for a writ of certiorari filed by the Federal Energy Regulatory Commission, the North Carolina Utilities Commission, and the North Carolina companies challenge the restrictions which the decision below would place on the FERC in carrying out its statutory mandate, under Sections 4(a) and 4(b) of the Natural Gas Act, to eliminate unduly discriminatory or preferential rates for natural gas service. The briefs in opposition filed by Brooklyn Union Gas, *et al.*, Long Is-

land Lighting, and the New York Commission—i.e., the parties which the FERC found had enjoyed unduly preferential rates at the expense of petitioners in Nos. 80-1938 and 80-1939—do not deny that the Natural Gas Act expressly prohibits unduly discriminatory or preferential rates, and that the court of appeals' decision will seriously complicate FERC's task in eliminating such rates. Rather, they rest their opposition to the grant of certiorari on what appears to be a major recasting of the decision below and a misreading of the governing precedents.

1. The basic legal difficulty with the court of appeals' decision is that, without warrant in either the language or logic of the statute itself, it seeks to engraft a complicated exception on the Natural Gas Act's simple requirement that "*the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company,*" Natural Gas Act, Section 4(e), 15 U.S.C. § 717c(e). The briefs in opposition seek to justify the court's ruling with a variety of alternative arguments. New York is clearly in error when it states that the language of the statute refers to "the *increase*" (NYPSC Br. 9), when in fact it refers to "the *increased rate*". Similarly, New York's contention (NYPSC Br. 8) that a pipeline's allocation of its cost of service to zones or classes of service is not "directly nor indirectly determinative of the rate increase it seeks" is incorrect; as Chief Judge Tuttle noted twenty years ago in *Tennessee Gas Transmission Co.* v. *F.P.C.*, 293 F.2d 761 at 769 (5th Cir. 1961) (dissenting opinion, emphasis supplied):[1]

> "The burden rests on the applicant to justify each rate increase. This includes the burden to establish the correctness of the *allocation of costs* of service as to *each schedule* filed."

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[1] The result urged in Judge Tuttle's dissent was ultimately sustained on certiorari in this Court, *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

The opposition briefs rely heavily on *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (NYPSC Br. 8, 13; Brooklyn Union Br. 7, 8, 9), and *American Louisiana Pipe Line Co.* v. *F.P.C.*, 344 F.2d 525 (D.C. Cir. 1965) (NYPSC Br. 13). Neither case, however, involved cost allocation or rate discrimination problems: *Mobile* involved whether the pipeline had, by contract, precluded itself from filing a rate change under Section 4, and *American Louisiana* was remanded for further proceedings essentially because the pipeline had not been given advance notice of the issue to be decided.[2]

2. Brooklyn Union's use (Br. 11) of a quotation from *Interstate Power Co* v. *F.P.C.*, 236 F.2d 372 at 387 (8th Cir. 1956), cert. denied, 352 U.S. 967 (1957), merits closer analysis, for the holding in that case stands for almost the exact opposite of Brooklyn's contentions here. There, as here, the pipeline had filed for increased rates using its prior allocations (there, a single uniform rate, with no zoning); the customers closer to the source of supply urged that the filed rates were discriminatory to them and preferential to the end-of-the-line customers; at the hearing, the closer customers and the Commission Staff both presented evidence allocating costs (and designing transportation rates) based on distance; the hearing examiner found in favor of the prior "historical" practice; and the Commission found that rates should be fixed on a distance (Mcf-mile) basis. At this point, the paths of the prior and the instant case diverge, for, on appeal by the end-of-the-line customers, the Eighth Circuit affirmed the FPC's 1955 adoption of the Mcf-mile

[2] There can be no question here that the discriminatory nature of using the 1962 differentials for 1976 costs was raised well in advance of hearings. Indeed, a settlement aimed at eliminating the discrimination had been filed with the Commission, and the discrimination issue was set for hearing, rather than resolved by settlement, only because of the opposition to settlement of two of the parties now opposing certiorari.

method of allocation for Northern Natural Gas Company, whereas here, the D.C. Circuit reversed the FERC's 1979 adoption of the Mcf-mile method of allocation for Transcontinental Gas Pipe Line Corporation.

In the 1956 *Northern* appeal, the end-of-the-line customers argued (similarly to Brooklyn Union-NYPSC here) that the Commission and the Eighth Circuit were precluded from deviating from the prior historical "method" because that "method" had been used in fixing Northern's rates in a 1949 Commission opinion and had been affirmed on appeal.[3] The court stated (236 F.2d at 387):

> "Petitioners' contention is to the effect that the Commission was precluded from fixing zones and differential rates for Northern.
>
> "We do not so conclude. It appears that this case presents the first instance in which the Commission has made what it has deemed to be a sufficient study of the facts to enable it to make definite and positive finding[s] that Northern's uniform rates are in fact unduly discriminatory. . . . We do not find sufficient cause to upset that ruling of the Commission."[4]

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[3] The prior case was *Trunkline Gas Co.*, 8 FPC 250 (1949), aff'd sub nom. *State Corporation Commission of Kansas* v. *F.P.C.*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922.

[4] In an ironic sidelight in the instant case, the court below completely misread the Commission's 1955 statement in *Northern*, 14 FPC at 19 n. 8—in which the Commission held that Section 4(b)'s ban on discriminatory rates was applicable in passing on increased rates under Section 4(e)—as a "recognition" by the Commission that its powers derived from Section 5, not Section 4 (FERC Pet. 14a). Actually, the Commission was merely noting that Section 4(e) explicitly gave the Commission in a Section 4 proceeding all the powers it would have under Section 5 as well as those available only under Section 4.

3. If, as each of the opposition briefs suggests (NYPSC Br. 7, 17; Brooklyn Union Br. 16-17; Long Island Lighting Br. 7), this case turns on substantial evidence and reasoned decision-making, it should be noted (a) that the evidence before the Commission here and the evidence in *Northern Natural* were virtually identical, and (b) that the Commission's rationale here was not only unusually detailed (it is set out at FERC Pet. 37a-50a), but it specifically relied on and quoted from the 1955 *Northern* opinion (*id.* at 39a-40a, 49a-50a). While the standard of review used by the court below is not entirely clear, its reversal of the Commission's result appears to rest not on a lack of substantial evidence but rather on a differing interpretation of the evidence from that provided by the agency. But this Court has, in a closely analogous situation, negatived such a construction of the substantial evidence rule, holding that substantial evidence

> "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 at 620 (1966).

WHEREFORE, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The arguments in respondents' briefs in opposition to our petition and to the petitions in Nos. 80-1938 and 80-1939 give added weight to our contention that the decision of the court of appeals raises substantial questions concerning the proper construction of the Natural Gas Act. Those questions warrant this Court's review.

1. Respondents concede, as they must, that Transco filed increased rates with the Commission, but they contend that, because the company did not propose to change its existing rate differentials between sales zones, the Commission could not consider those differentials under Section 4 of the Natural Gas Act. Respondents, however, fail to focus on the precise language of Section 4(e) of the Act, 15 U.S.C. 717c(e), which sets forth the burden of proof requirements

in connection with a gas company's proposal for increased rates: "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

Contrary to respondents' suggestions (N.Y. Pub. Serv. Comm'n Br. in Opp. 9; Customer Br. in Opp. 12-13), the statute does not limit the company's burden to proving only the reasonableness of its "increases" in charges; the language plainly encompasses the entirety of the "increased rate." Thus, under the statute, each component of that new rate must be justified by the pipeline sponsoring it. Moreover, the statute draws no distinction between "changed" versus "unchanged" elements of the new rate; nor does it distinguish between increases in costs, on the one hand, and the pricing structure used to recover those costs from the company's customers, on the other. In short, the procedures provided in Section 4 of the Act govern the "newly changed rate" as set forth in the company's new rate filing.[1]

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[1]The purpose of the proceeding under Section 4(e) is to determine whether the new rate is just and reasonable. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 340-341 (1956). Contrary to respondents' views (N.Y. Pub. Serv. Comm'n Br. in Opp. 12-13; Customer Br. in Opp. 8-9), the Court in *Mobile* did not hold that in a Section 4(e) proceeding the Commission has jurisdiction only over changes that the company has proposed to make to an existing rate structure. Instead, as we noted in our petition (at 12-13), *Mobile* holds that the Natural Gas Act does not authorize a pipeline to make unilateral contract changes. See *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Customer respondents assert (Br. in Opp. 12) that "the Commission has consistently applied § 5, not § 4" of the Act in cases involving proposals to change a pipeline's existing rate structure or allocation practices. All but one of the cases relied on for that proposition, however, relate to the manner in which the Commission has treated United Gas Pipe Line's purchased gas costs. Given the narrow focus of those cases, which concern a single pipeline's tariff's purchased gas

2. Respondents ignore the serious impact of the court of appeals' decision on the Commission's authority to order refunds of the portion of an increased rate later found unlawful.[2] The court below held that the Commission could not proceed under Section 4 to modify any element of an increased rate unless the modifications "represent at least partial approval of the change for which the enterprise had petitioned in its filing" (Pet. App. 33a). Under that holding, only those portions of the increased rate that stem from "changes" proposed by the company may be reached under Section 4(e). That section provides that the Commission may "order [the] natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." The decision below thus renders the Commission powerless to order a refund of any excessive charge, no matter how significant an element of the increased rate, unless that particular element reflected an actual "change" proposed by the company. This result undercuts the statute's essential purpose, which is to protect consumers from excessive rates. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389-390 (1959).

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adjustment clause, they cannot be said to demonstrate the existence of the "consistent rule" that respondents urge upon the Court. Nor does the decision in *Michigan Wisconsin Pipe Line Co.*, 34 F.P.C. 621 (1965), aid respondents. There, the Commission simply determined that the proponents of a change from systemwide rates to zone rates on the pipeline had failed to support their proposal and that the record supported maintaining the status quo. In contrast, the cases cited in the petition (at 14 n.8), show that the Commission frequently orders changes in elements of increased rates under Section 4 without regard to whether such changes "represent at least partial approval of [a] change for which the enterprise had petitioned in its filing" (Pet. App. 33a).

[2]Indeed, respondent Long Island Lighting Company reaches the startling conclusion (Br. in Opp. 3) that, regardless of the provisions of the Act, "the Commission is probably better off without the power to implement changes in rate design retroactively." We submit that Congress, not the courts, has the responsibility of deciding, as a matter of policy, what powers the Commission should have.

3. Respondents' reliance (N.Y. Pub. Serv. Comm'n Br. in Opp. 15; Customer Br. in Opp. 9) on the "filed rate" doctrine as barring the Commission from exercising Section 4(e) authority over so-called "unchanged" elements is misplaced. When Transco's previous rate was in effect it was indeed the lawful, filed rate which the pipeline was authorized to collect and, like any other filed rate, it could not, pursuant to Section 5(a) of the Act, 15 U.S.C. 717d(a), be modified retroactively. See *Arkansas Louisiana Gas Co.* v. *Hall,* No. 78-1789 (July 2, 1981), slip op. 6. Once the pipeline placed its increased rate in effect, however, that new rate became the "filed rate" and the preexisting rate became a matter of history. In other words, the filed rate doctrine merely bars a pipeline, during the period in which a lawful, filed rate is in effect, from collecting charges other than those reflected in that rate. The doctrine accords no special status to components of past rates carried forward unchanged by the company when it adopts new, increased rates that are subject to scrutiny under Section 4(e) of the Act.

4. Respondent Customers contend (Br. in Opp. 16-17) that the court of appeals' decision may be upheld on the "independent" ground that the Commission's order prescribing a different method of cost allocation was not supported by substantial evidence. But the court's conclusion that the Commission failed to support its order by substantial evidence was based on the erroneous assumption that the Commission had the burden of justifying " 'any departure from a long standing practice' " (Pet. App. 17a, quoting from *Columbia Gas Transmission Corp.* v. *FERC,* 628 F. 2d 578, 586 n.31 (D.C. Cir. 1979)), even where, as here, the "long standing practice" was the product of settlements with respect to which the Commission expressly stated that it was not to be bound in future proceedings. Thus, if, as we

contend, the court of appeals erred in according precedential effect to the Commission's prior approval of settlements incorporating the historical cost allocation differentials, it follows that the court also erred in its analysis of the "substantial evidence" question.

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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